

THE RIGHT TO OWN PROPERTY

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

FIRST SESSION

ON

S. 605

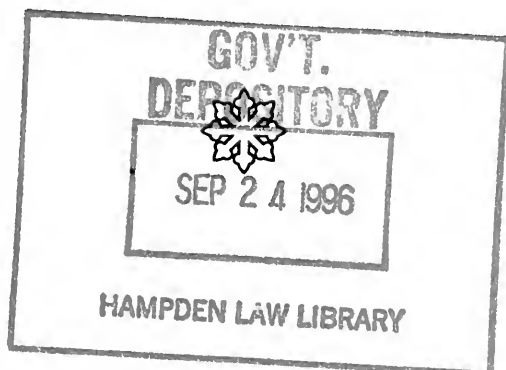
A BILL TO ESTABLISH A UNIFORM AND MORE EFFICIENT FEDERAL
PROCESS FOR PROTECTING PROPERTY OWNERS' RIGHTS GUARAN-
TEED BY THE FIFTH AMENDMENT

**WASHINGTON, DC; SALT LAKE CITY, UT; AND
WASHINGTON, DC**

APRIL 6, JULY 3, AND OCTOBER 18, 1995

Serial No. J-104-17

Printed for the use of the Committee on the Judiciary



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WASHINGTON : 1996

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THE RIGHT TO OWN PROPERTY

THURSDAY, APRIL 6, 1995

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
WASHINGTON, DC.

The committee met, pursuant to notice, at 10:02 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Orrin Hatch (chairman of the committee), presiding.

Also present: Senators Thurmond, Grassley, Kyl, Biden, Leahy, and Feinstein.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. We will call the committee to order.

Our first witness this morning is going to be Ms. Nellie Edwards, of Provo, UT. So, Ms. Edwards, if you would care to take the front chair, we are sorry to jump you ahead of some other witnesses, but we think this is the way we will do it.

The fifth amendment to the Constitution of the United States guarantees that private property shall not, "be taken for public use without just compensation." This is not a suggestion. This is not a preference. This is not a recommendation. It is a constitutional command.

So important is the right to property that the Framers saw fit to place its protection alongside such fundamental rights as due process, the right against self-incrimination, and protection against double jeopardy. Thus, when we speak today about defending the right to private property, it is vital that we always keep in mind that it stands as one of the greatest of American freedoms.

In spite of the overwhelming importance of property rights, in recent years the Federal Government has trampled on those rights. A well-intentioned desire on the part of the Federal regulators to protect a wide variety of interests has led to a dramatic increase in the amount of property that is being taken away from rightful owners by the Federal Government.

We will hear one of the thousands of examples of such Federal encroachments today from Ms. Nellie Edwards. She suffered the double hit of having her property declared a wetland by the Army Corps of Engineers and then having it condemned by the city of Provo, UT. Thanks to the wetland designation, the city was able to pay a mere \$600 per acre for her land, land which was worth at least \$7,500 per acre way back in 1973.

The Omnibus Property Rights Act contains several features which combine to protect private property in a responsible and rea-

sonable manner which is in keeping and faithful to existing Supreme Court rulings. The bill codifies and clarifies the area of takings law and court jurisdiction to enable the property owner to vindicate his rights; requires that all Federal agencies examine proposed regulations to assess the takings impact of those regulations; creates a streamlined administrative remedy for claims arising under the much maligned Endangered Species Act and the wetlands provision of the Clean Water Act; explicitly provides for arbitration, which will also serve to avoid expensive litigation costs; and provides that all awards or settlements for takings claims will be paid out of agency budgets.

All these provisions will combine to achieve remarkable results. Not only will private property owners be equipped to defend themselves, but the Federal Government will benefit from this bill as well. By forcing the agencies to consider the costs of their takings, the agencies will steer away from unnecessary takings.

The clarifications in the law will permit both the agency and the property owner to more accurately determine what will be considered a taking before the matter goes to court. Finally, by imposing the cost of the agency's action on the agency itself and not on innocent individual property owners, the agency will be certain to achieve its statutory goals with as little taking of private property as possible.

Now, there have been a lot of exaggerated arguments made by the opponents of this bill. These arguments are absolutely unfounded and absurd. Listening to them, you will begin to think the sun will explode if we pass this bill. Today, we will address those exaggerations so we can get beyond them and concentrate on the real issues.

This bill simply protects the rights guaranteed to all Americans by the fifth amendment. It does so fairly, reasonably, and in a way that allows us to protect the environment as well as public health and safety. Those who call this bill flawed should understand that they are, in essence, calling a part of the Bill of Rights flawed in the same breath. It is our purpose to enact this legislation and restore the fundamental right to property that this Nation is founded upon.

Senator Thurmond, do you have any opening remarks?

Senator THURMOND. No. We are glad to have you here and glad to have you speak out and tell us exactly what happened. I think that would be of very much benefit to the public. Again, we thank you for coming.

The CHAIRMAN. We are hopeful that Senator Dole and Senator Gramm will be here within the near future, but we will begin our hearing by calling upon Ms. Nellie Edwards.

We are delighted to have you here as my fellow Utah constituent. We appreciate your making the efforts to be here and we think your testimony is very important in the overall consideration of this matter. So, Ms. Edwards, we will be delighted to listen to you.

STATEMENT OF NELLIE EDWARDS, PROVO, UT

Ms. EDWARDS. May I say to you how grateful I am to be here, and for the few minutes that you will spend with me, I am truly grateful.

My name is Nellie Edwards. I am from Provo, UT. My husband, Phil Edwards, and I have been ranchers for many years. Our farm is located on the east shore of Utah Lake and borders the Provo River as it flows into Utah Lake. We have been property owners in Utah for 50 years.

Three years ago, my husband, Phil, passed away. Shortly thereafter, I was informed that my land had been condemned by Provo City. I was told they planned to use my land to enlarge an existing extremely profitable campground near the lake. It seemed I didn't have much choice in the matter because the laws were clearly on their side. Today, I can walk down on the land on which our cattle used to feed and see the mobile trailer hookups.

Just before my husband passed away, he told me to protect this lakefront property because it was a prime location and to not let anyone take it away from me. Phil had good reason to issue this warning because he had lost valuable land to condemnation twice in his lifetime. My husband had had the foresight to see that there was no other piece of property like this in the entire State. He knew that someday this land would be sought after because of its view of the lake and the sandy beaches.

I have taken this condemnation particularly hard because this is the third time that a government entity has condemned property which belonged to this family. In 1938, my husband and his brother owned a large dairy farm in Charleston, UT. The Government entity condemned this farm for the building of a reservoir. They took possession of the property, giving very little compensation to these two brothers. Three days later, as Phil and his brother rode across their land to get to their cattle, they were told by a local sheep herder that they were trespassing and that he had leased the land from the Government. At the time this first condemnation took place, my husband was only 19 or 20 years old. He and his brother tried to fight for their land, but they lost it in court.

In 1973, our family had its second experience with losing land to condemnation. That property included our feed yard, a nice shed, a flowing well, and good protection for our cattle. Even though we did not want to sell the property, we were able to reach an agreement to sell it for \$7,500 an acre. Since then, it has become one of the State's most profitable campgrounds.

Now, we find ourselves in the position of having our land taken for the third time. In this most recent condemnation, the city carefully laid all their groundwork in secret behind closed doors. Land owners were not informed of the revisions and changes in plans until there was nothing we could do to stop the taking of our land.

The intimidation used by these people has been very difficult because I have not had Phil to help me fight this battle. I have desperately asked for fair market values for my land and have been told that my land was now valueless because it had been declared a wetland, even though we had never been notified by the Corps of Engineers nor anyone else. When I voiced my opinion that I was unable to understand how a wetland could be used for a trailer park, I was told that if I did not accept this offer, they would challenge my title to the land ownership.

I have since learned that the city was able to acquire property at \$600 an acre because 27 of the 35.5 acres have been designated

as wetlands. However, this property is now being developed into an \$800,000 campground which will accommodate over 60 recreational vehicles per night and has excellent potential for profit.

I did not want to sell my land and have been denied the opportunity of developing it myself. My biggest fear, however, is that if these agencies are allowed to take this valuable recreation property at these low-ball prices, they will come back and take the rest of my property. I have always worked very hard to be independent, and this land was supposed to support me and my husband in our retirement years. We did not have the benefit of working for a company which would provide us with retirement programs. Our land was our security, and that security is now being taken from me when I need it the very most.

The CHAIRMAN. Well, thank you. That is a very, very touching and interesting story. How many acres were involved?

Ms. EDWARDS. Thirty-five and one-half acres.

The CHAIRMAN. Thirty-five and one-half, and how much did you get per acre?

Ms. EDWARDS. Six-hundred dollars.

The CHAIRMAN. And this was when? What year was it?

Ms. EDWARDS. Just recently.

The CHAIRMAN. In the last few years?

Ms. EDWARDS. Yes.

The CHAIRMAN. But in 1973, on other acreage that they took, they paid you \$7,500 an acre?

Ms. EDWARDS. Right, and you can step from the piece that we sold in 1973 to the piece that they have taken off me today; they are connected.

The CHAIRMAN. Do you have any estimate of what that land really would have been worth had it not been declared a wetland?

Ms. EDWARDS. I am scared.

The CHAIRMAN. I understand. I don't blame you.

Ms. EDWARDS. We have sold ground down there. My ground surrounds the park, the Utah State Park. I am all around them, and we sold ground in 1981 for \$12,000 an acre. Today, my ground is selling for \$18,000 to \$20,000 an acre within a 1½ miles of this ground.

The CHAIRMAN. One of the things I find most disturbing about uncompensated takings like yours is the appalling number of people who, like you, have purchased land so that they could support themselves when they decide to retire, and then all of a sudden turn around and have their life savings just stolen away from them.

Ms. EDWARDS. Right.

The CHAIRMAN. For years, people in America have always said you can't go wrong with real estate, but now it seems you can. Given everything that has happened to you and your family, what advice would you give to somebody who is planning for their retirement by acquiring real estate and holding on to it?

Ms. EDWARDS. Oh, my gosh, Senator Hatch, I think I would say get you a really, really good lawyer, one that is really honest. [Laughter.]

The CHAIRMAN. I think what you said in your opening statement really told the story of why we need this bill far more eloquently than I can, so let me just ask you one more question.

Some people have suggested that requiring government to properly compensate owners when taking their rights will somehow hurt property owners. So, as a property owner, do you think you would be better off if the government had to fairly compensate you for taking your property or better off just keeping your property?

Ms. EDWARDS. Is this your bill you are passing?

The CHAIRMAN. Yes.

Ms. EDWARDS. That is what I want, that is what I want. [Laughter.]

The CHAIRMAN. I don't think I could have a better endorsement of the bill than that. [Laughter.]

One last question. There must have been a lot of water on this property, I guess, for them to declare it a wetland.

Ms. EDWARDS. No, no, absolutely not. It is dry. They are putting a campground on it.

The CHAIRMAN. You mean this is dry property, 35.5 acres, that they declared a wetland, so you had to sell it for \$600 an acre so they could build a campground on it?

Ms. EDWARDS. Right.

The CHAIRMAN. And the campground is worth what?

Ms. EDWARDS. I guess, \$800,000.

The CHAIRMAN. Something you could have done, if you had wanted to, on your own?

Ms. EDWARDS. Yes, absolutely.

The CHAIRMAN. Well, it makes me feel badly that that happened in my own home State, but your situation is not too dissimilar from a lot of other people who have had drylands declared wetlands under the same and similar circumstances. I think it is a flagrant example of how far some of our laws have gone. I want to compliment you on being here today.

Senator Thurmond?

Senator THURMOND. I just want to congratulate you for coming here and exposing this situation. This is land you owned yourself. The government has taken it. They did not pay you adequately. In South Carolina, we have wetlands, so I know exactly what you are talking about and I think you are exactly right.

Ms. EDWARDS. May I thank you. I am so grateful that you are listening to me.

The CHAIRMAN. Well, we are, and I don't know what we can do, but we are going to look further into your case and see what can be done. Neither the Federal Government nor the States should be doing things like what happened to you. So we appreciate your taking time to be here and we thank you for your testimony.

Ms. EDWARDS. Thank you. The privilege is mine.

Senator KYL. Mr. Chairman?

The CHAIRMAN. Excuse me. I didn't notice you, Senator Kyl.

Senator KYL. I came in the front rather than the back door.

The CHAIRMAN. Senator Kyl?

Senator KYL. I just wanted to also compliment Ms. Edwards. My home State of Arizona is much like your State. There is not a lot wet to it, and yet we have been declared wetlands in some areas,

too. You may have been nervous coming here today, but, believe me, you give us a lot of spirit to fight this battle, and we will use your case as an example. So it may have been detrimental to you, but it will help in our fight.

Ms. EDWARDS. Good.

Senator KYL. You should know that when you leave the witness table there, you will see behind you this entire room is full of people who are concerned about this issue. We have the key people in the Senate who have sponsored this legislation, this Hatch bill, some of whom are about to testify here. So there is a lot of strength behind your idea and behind the chairman's idea, and I am confident that we will be able to rectify this situation for people to come.

Thank you for being here.

Ms. EDWARDS. Thank you.

The CHAIRMAN. Thank you, Ms. Edwards. We appreciate you being here, and thank you for taking the time to come, and your family as well.

Ms. EDWARDS. Thank you.

The CHAIRMAN. We now have the privilege of having one of our fine colleagues, who, of course, is one of the great leaders in the U.S. Senate and in this country. We are happy to take your testimony, Senator Phil Gramm from Texas.

STATEMENT OF HON. PHIL GRAMM, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator GRAMM. Mr. Chairman, I want to tell you I am very happy that I was able to hear Nellie Edwards because what we heard here was the voice of America. What we heard here was the outrage that exists in America when we have a situation that the Founding Fathers could have never in their wildest dreams imagined. In America in 1995, it seems that two consenting adults can engage in any kind of consensual behavior with total constitutional protection—except owning private property and engaging in commerce and business.

The reason that you are here today, the reason that we have all joined together—many of us who wrote our own bills to put together one bill, is that we want to protect property rights in America. The Constitution of the United States says very clearly that no private property shall be taken for public purpose without just compensation. Yet, as we just heard from Nellie Edwards—and as we all know from our own States—over and over again, everyday all over America, people are having their private property taken. They are not compensated. It occurs whether a Red Cockaded Woodpecker flies into your pine trees in Texas, or whether a farmer bush-hogging in California runs over a rat that turns out to be an endangered species. People are having their property values reduced and effectively having their land taken to promote an objective which society says is good, but which society refuses to pay for.

I think it is vitally important that we change that. I think it is important that we guarantee that every American who has their property taken or where a government regulation or Federal action lowers the value of their property substantially, the Federal Government ought to have to pay them for it. That will accomplish two

things. Number one, it will preserve the constitutional rights of our people, and it is about time. Secondly, it will force government to make rational decisions. Because if we want to protect the Red Cockaded Woodpecker, or endangered rats in California, part of the cost of that protection will be paying private land owners who have the value of their land in use or exchange reduced. I think it is important.

Finally, Mr. Chairman, in addition to congratulating you and this committee for your leadership, I want to make one comment about statements that the Vice President has already made and statements that I understand will be made today by a member of the Justice Department concerning a veto. The President is clearly threatening that if we adopt this bill, he will veto it. The President opposes compensation when people have their land taken or have its value substantially reduced. It seems to me important that the American people must understand the difference between our view and the President's view. The President's quarrel is not with us. The President's quarrel is not with our legislation. The President's quarrel is with the fifth amendment of the Constitution of the United States.

The fifth amendment says if you take somebody's property, you have to pay them for it. For 40 years our Government has been taking property without paying for it. We are trying to bring back protection of constitutional rights. The President is threatening to use veto power to stop us from doing that. His quarrel is not with Senator Hatch, or Senator Thurmond, or Senator Kyl. His quarrel is with the fifth amendment to the Constitution of the United States, and I think it is very important that people know that.

I think, except for the balanced-budget amendment to the Constitution, that this bill is the most important thing that we are going to vote on this year, and I congratulate you for your leadership and I thank you for giving me a chance to simply come here and be a cheerleader today.

The CHAIRMAN. Well, thank you, Senator Gramm. We appreciate your testimony. It is persuasive and powerful, as always. I have to say that I hope the President won't veto this because it is long overdue. What government has done—and in this case we had both the Federal Government and the State government combine and really robbing this widow of her property, and that is repeated many times all over this country.

All we are saying is if the government wants to take property, it should have a justifiable reason for doing so, and it really ought to pay just compensation like the fifth amendment says, and that is what you have said here today. I want to personally thank you for taking time out of what I know is a tremendously busy schedule to be here.

Senator Thurmond?

Senator THURMOND. Senator, I want to congratulate you on that excellent statement. I wish every American could have heard what you had to say on this subject. This is a matter of vital importance to the people of this country. The constitutional provision is clear and protects the people, but that has not been the case with the government; they have gone on anyway.

I am very pleased that you have come here and testified.

Senator GRAMM. Thank you, Senator Thurmond.

The CHAIRMAN. Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

Senator Gramm, I have one question, but first let me say that your appearance here today confirms what I already know, and that is that you are one of the foremost champions of private property in this country. You understand its role to our future and I appreciate that very much.

We just passed unfunded mandate legislation which says that if the Federal Government imposes requirements on States and local governments, we ought to pay for it. Now, the States and local governments don't have a constitutional right like private property owners do, but what is the difference between the Federal Government imposing a requirement or regulation on the States and having to pay for it and doing the same thing on a private property owner?

Senator GRAMM. Well, I think that the question you pose is a very good question, and I think that if the President vetoes this bill or if those who oppose it are able to use the filibuster to stop it, what they would seem to be saying is that the will of the Federal Government is more important than the constitutional rights of our people.

I don't think that there is a right in America that is more fundamental than the right to own property and to have security in that property. I just go back to a point I made earlier and amplify it. The Founding Fathers understood that security in property was essential to freedom. They understood that freedom of speech and assembly was of no real value if you weren't secure in your property. If government could threaten your property, these other freedoms didn't matter very much.

The Founders had a very clear focus on property and its protection as being fundamental to freedom. It is an incredible quirk of history that as we have worked to try to protect rights under the Constitution, the fundamental right of private property is not one of those rights that has been championed in the courts or in the press.

If someone stood up and said that people did not have the right to go on the street corner and shout their opinion, there would rightly be an outcry from both political parties, from Congress and the White House, from an editorial board at every paper in America. Yet we hear that people have their property effectively stolen by government, in clear violation of the Constitution and where is the outcry? Where is the righteous indignation?

The point is that the right to own property is what gives the right to freedom of speech any real meaning, and that is why I take this issue so seriously. I know it is why you take it so seriously.

Senator KYL. Thank you.

The CHAIRMAN. Senator Feinstein, do you have any questions?

Senator FEINSTEIN. Good morning, Senator. I have no questions of this Senator. Thank you.

The CHAIRMAN. Thank you, Senator Feinstein.

Thank you, Senator Gramm. We appreciate your taking time to be here.

We will also place a statement by Senator Dole in the record today, without objection.

[The prepared statement of Senator Dole follows:]

PREPARED STATEMENT OF SENATOR ROBERT J. DOLE

Mr. Chairman, let me say first that I appreciate your having me here this morning for a few introductory remarks.

Since last November's elections we have pursued an ambitious program of reform to fundamentally change and improve the relationship between the government and its citizens.

To the defenders of business as usual, these are wrenching changes—changes like a balanced budget amendment; regulatory reform; and even the elimination of cabinet level departments. But we will continue to fight for these reforms, and for the American people.

Mr. Chairman, many of these reforms have come through this committee, and today you take up yet another important task. This committee considers one of the most fundamental clashes between government power and individual liberty: the taking of private property for public uses. There is perhaps no greater foundation for a successful free society than private property. Private property rights are the rights to enjoy the fruits of our labor and our ideas and deservedly enjoy special protections in the U.S. Constitution.

One of the most basic of these protections is found in the fifth amendment to the Constitution: "Nor shall private property be taken for public use, with just compensation." As the Supreme Court has stated, this protection is about basic fairness: Preventing the government "from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." The fifth amendment thus provides a balance between public necessity and individual liberty.

Today, however, this balance is missing. A regulatory state that seems only to grow and grow—that is increasingly intrusive—has provided the means for a sustained assault on private property rights in America. It is our duty to ensure that we limit the arbitrary exercise of government power and pursue worthwhile goals in ways that also protect the rights of our citizens.

Mr. Chairman, I am proud to be a co-sponsor—along with you, Senator Heflin and other members of this committee—of S. 605, the "Omnibus Property Rights Act of 1995." I want to especially commend you for your leadership of the working group that produced this bill.

I know that others will address in more detail the provisions of this bill. But I would like to make one point about our bill.

The reforms contained in this bill do more than provide that "just compensation" is paid in proper circumstances. The initial test of property rights legislation is to ensure that we minimize the number of takings that occur in the first place.

We need to ensure that when we pursue otherwise laudable goals, that we do so in ways that allow the government to take private property only as a last resort; and when it is necessary to do so, to insist that just compensation is paid to the property owner. The "Omnibus Property Rights Act of 1995" accomplishes these goals, and I urge this committee to report a strong bill as soon as possible.

The CHAIRMAN. Let us call at this time now a representative from the Justice Department, a good friend, Associate Attorney General of the United States, Mr. John R. Schmidt.

Mr. Schmidt, we are happy to have you with us today and we look forward to hearing your testimony.

STATEMENT OF JOHN R. SCHMIDT, ASSOCIATE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. SCHMIDT. Thank you, Senator. I am happy to be here and have an opportunity to present the views of the Justice Department on this legislation.

We don't think the sun will fall from the sky, but we do think that this is a piece of legislation that presents some major risks to the ability of the Federal Government to function in ways that we have all become accustomed and used to it being able to function.

We also think it presents some major risk to the taxpayers of having to pay substantially increased costs in compensation to property owners in circumstances where under current law that kind of compensation would not be required.

We obviously come to this with the premise of support for private property. It is a bedrock American principle; it is a bedrock constitutional principle; and, as your own comments have indicated, it is embodied in the Takings Clause of the fifth amendment, which the Chief Justice has said recently is as much a part of the Bill of Rights and the Constitution as the first and the fourth and other provisions.

There has been much litigation regarding the Takings Clause over the years. Much of that litigation over the last 70 years or so has involved the question of when regulation, which does not involve the actual taking of property, nevertheless goes so far that it requires the government to pay compensation and will be deemed to be a taking. In making that judgment, the courts have looked to a number of different factors. They have looked at the extent of the regulation: Does it deprive the property owner of all productive or economic use of the property, or does it just take away one or another particular uses of the property? They have looked at the property owner's reasonable expectations: Is it a form of regulation that one could have reasonably anticipated or is it, to use the Court's phrase, inconsistent with reasonable investment-backed expectations? They have looked at the nature of the public interest that the regulation is serving: Is it a narrow special interest for which a property owner is being asked to sacrifice or is it a general public interest which is serving the interests of that property owner along with the rest of the public?

It is clear that the trend of the law in this area has been in favor of increased protection for property owners, but no Supreme Court decision has ever come anywhere close to upholding or maintaining the doctrine which is embodied in the legislation before this committee. That legislation provides, that, regardless of any of those other factors, the Government will be required to pay compensation when it takes action that reduces the value of any portion of a property by a third or more.

That is a doctrine which will require compensation in a wide variety of areas where it would not be required under current law, and I think it is important to understand we are not talking just about the environmental laws. A lot of attention has been presented in that area, but we are talking about a whole range of government actions that have an impact on the value of property: agricultural restrictions; the ADA, which requires property owners to provide access for the disabled; a whole of business regulations, ERISA requirements, bank regulations, et cetera.

Those are all areas where over the years people have tried to recover under a takings theory. What this bill would say is that in any area where the government acts, it is required to pay compensation if the result is a reduction in the value of property, or any portion of property, of a third or more.

I think in doing that, and in flying in the face of the variety of factors that the courts have considered over the years, it really is running directly counter to two basic principles that the courts

have looked to. One is a principle of fairness and community, the notion that, in general, we own property in this country subject to reasonable regulation in the public interest. And since we all share in the benefits of that regulation, we should not, in general, be able to exact a price from our neighbors for complying with that form of regulation.

This principle is easy to see if we are talking about regulation to achieve some general common good, such as clean air or clean water. But the courts have talked about the fact that even more particular kinds of regulation result in what they have called an average reciprocity of benefits, where overall we benefit. Thus, in any particular case we are not entitled, absent the special circumstances that the courts have looked at, to recover just because there has been a reduction in the value of our property.

I think that in trying to enact into law this kind of across-the-board principle you are also flying in the face of another basic notion, which is a notion of necessity. Justice Holmes, in the decision which first enunciated the regulatory taking doctrine, referred to the fact that the Government literally could not function if it was required to pay compensation every time it took action that reduced the value of property.

There really are two alternatives available to us with respect to any significant form of regulation if this bill passes. One is that we will take a look at it and see that the price is so great that we just won't go forward. I think there is a tendency when people look at legislation of this kind to pick some area of regulation they don't like and say, "Well, that is a good thing; we will bring that to a halt."

During the hearings before the House, there was a witness from the Cato Institute who said one of the reasons he supported this kind of legislation was it would bring enforcement of the ADA to a halt. Well, that may be a good thing from his perspective, but the problem with this kind of across-the-board legislation is it doesn't apply just to regulation that he doesn't happen to like or just to regulation that I don't happen to like or that somebody else doesn't happen to like. It applies across the board, and I think there is a real risk here that we will bring to a halt forms of regulation that the American people have come to rely on.

The other alternative available to us, is that we will look at the proposed legislation and we will say, "OK, we will go forward." We may do that because the statute itself provides no discretion, or we may do it because the regulators and Congress and the American people expect action in that area. At that point, we will have to pay the price, and the price at that point is paid by the American taxpayers.

I don't know what that price will be. Frankly, nobody knows what that price will be. There is one estimate that is cited in my written testimony where several years ago the General Accounting Office looked at a similar statute, applied to a particular piece of environmental legislation, and found a price of \$10 to \$15 billion. But that is only one estimate; that is only one statute.

The one thing that is clear is we are talking about multiple billions of dollars, real money by anybody's standards, and it is our money. It is not as though there is some pot of gold somewhere

that we go to and we find the money to pay compensation to property owners. If compensation has to be paid, it comes from the taxpayers, which, when you look at who pays taxes in this country, means primarily middle-income, middle-class people who pay the bulk of the taxes in this country. So what we are talking about is requiring middle-income, middle-class taxpayers to pay the cost of increased compensation to property owners.

There is another consequence that will flow, and this one, I would say, is absolutely inevitable regardless of what else happens. This legislation will produce a huge volume of litigation. I asked our lawyers in the Justice Department who do work in this area how often it is the case that the difference between our initial estimate of the value of property and a property owner's is more than a third. The answer was virtually every case over 90 percent. And remember what we are talking about here is a principle that says everytime the Government takes action that results in a reduction in value of property or any affected portion of property of a third or more, the Government will be required to pay compensation.

It is clear to me what we are doing is creating a litigable issue that will be litigated in literally hundreds of thousands of additional cases. So at a time when we are all trying collectively to reduce litigation and reduce the kind of government bureaucracy that is necessary to handle litigation and, in general, reduce the complexity of government, it seems to me this is moving in just the opposite direction.

For all these reasons, we do believe that enactment of this bill would be a mistake. The Justice Department will join the Vice President in recommending to the President that he veto legislation of this kind with an automatic compensation entitlement, but I hope it will not come to that.

It is my understanding that the motivations of this legislation lie primarily in particular problems with particular regulatory statutes and, particular regulatory actions which people have regarded as problems. If that is true, the answer is to focus on those problems and figure out how to solve them. I don't think there is any substitute for that kind of individual judgment. I don't think you can take refuge or recourse to this kind of really radical, abstract principle, which I do think has a major risk inherent in it that it will make it difficult or impossible for the government to function in a wide variety of areas and, alternatively, has the major risk of imposing some major unpredictable, but clearly massive new costs on the American taxpayers.

So, for all those reasons, we are opposed to it, and I will stop at that point and would be glad to respond to any questions.

The CHAIRMAN. Thank you, Mr. Schmidt. We are glad to have your testimony and the testimony of the administration, but your testimony seems to indicate that, my gosh, if this bill passes, the government is just going to have to pay too much money to take people's property.

Much of your argument is based on the supposition that the concept of nuisance is all but nonexistent. But as commonly understood, the doctrine of nuisance is quite significant, and I think would nullify the parade of horrors that your statement and you here today claim that the bill will create. For example, dumping

toxic pollutants into the water is clearly a nuisance use and would not require compensation, if regulated, and many others as well. Yet, somehow you seem to believe the opposite.

So my question to you is what precedent do you cite to support your claim that a use which causes a harmful physical trespass is not a nuisance use?

Mr. SCHMIDT. Well, Senator, the exception for circumstances where there is a violation of State law nuisance doctrine, where the action involved is one that would violate State law nuisance principles, it seems to me gets you almost nowhere in dealing with the areas of Federal regulation that we are concerned about. Really, by definition, the Federal Government has acted in these areas because State law was insufficient. There was seen to be a Federal interest, a Federal need for action.

So in the whole range of areas where the Federal Government acts—whether it is the Americans With Disabilities Act or it is bank regulation or it is agricultural restrictions that are designed to assure that sanitary and phytosanitary standards are met are areas where the Federal Government has felt a need to get involved. So in all those areas, in anything that goes beyond something that is already a violation of State law nuisance doctrines, you are going to have a necessity for compensation under this bill if there is a reduction in value of more than a third.

I would agree with you that in the single circumstance where there is already a violation of State law nuisance doctrines, then the impact is reduced, but that is a very narrow exception if we are looking at the whole range of Federal regulatory activity.

The CHAIRMAN. It may be, but what you seem to be saying is that, my gosh, if the Government has to pay for all these takings, it is going to cost the taxpayers a lot of money. One of the reasons we filed this bill is maybe the Government shouldn't be making so many takings. They should not be making so many takings, just to make that clear.

Certainly, they would have to think twice before they start doing it because they are going to have to pay for them if they do, which is what the Founding Fathers really wanted. That is what they contemplated when they wrote the fifth amendment. So just saying, well, it is going to cost taxpayers money, well, that is tough. I mean, the concept of personal property rights, it seems to me, should be valued more than the Government's right to just indiscriminately take property.

We brought Nellie Edwards here for one reason. Her case illustrates what is happening to literally thousands of Americans all over the country. Having been one of the authors of the Americans With Disabilities Act and having managed the bill on the floor, I personally don't believe that this is going to cause any takings problems at all to the Federal Government or any excessive taxpayer problems. I personally do not believe this legislation will cause any problems in that area at all.

In your submitted testimony, you make the common mistake of claiming that this bill would stop local governments from engaging in normal zoning activities. Now, to set the record straight, you should know that this bill explicitly applies only to the actions of the Federal Government. It doesn't apply to the State government.

Now, can you please tell me how you can claim that a town will be subject to a law which explicitly does not apply to it?

Mr. SCHMIDT. The bill applies to Federal Government actions and to State actions which are funded by the Federal Government, but we didn't mean to imply, if there is something there that implies it, that State or local law would be directly covered by this law.

If I could just respond for just a moment to what you were saying earlier, it isn't a question of not wanting to pay compensation for the taking of property. It is a question of what is going to be viewed as a taking of property. And the question is whether, in deciding whether regulatory action is sufficiently severe and restrictive that it shall be deemed to be a taking, we are going to take into account the various factors that the courts have looked to, such as the initial expectation of the property owner, the nature of the government interest; or whether we are going to have an absolute doctrine which says whenever regulatory action results in a reduction in value, that shall be deemed to constitute a taking. That is the issue.

I think we all agree there should be compensation paid when there is a taking, but what we are saying is that this bill goes way, way beyond any doctrine that the courts have ever been willing to accept in terms of defining what a taking is. The question at that point is, obviously, if there is a taking, you have to pay for it, and the point I am making is if you radically expand the definition of "taking," then somebody is going to have to pay that large increase in cost and that is going to be the American taxpayers.

The CHAIRMAN. I understand. That is why we have the legislation because the courts have been very narrow in their interpretation of the takings doctrine. They seem to be moving in the right direction, but they are still very narrowly construing it.

If your recommendation that this legislation be vetoed happens to occur and the veto is sustained, that would be a victory for big brother against the rights of common citizens throughout this country; at least that is my opinion. It would be a tremendous loss for ordinary Americans.

Let me just say this. Whenever we file legislation, I don't consider that the holy grail of legislation. I would prefer to have the administration working with us and telling us we can correct it and how you would like to see legislation. We all want to be concerned about the taxpayers, but every taxpayer out there has got to be concerned that one day what happened to Nellie Edwards could happen to them, and frankly that is why we have that Fifth Amendment Takings Clause in there so the government can't just go in and take people's rights away from them without paying just compensation, not just compensation.

So I would suggest to you, and I know that you are this type of a person, is let's look at the bill, let's see what we can do to refine and make it better. We are open to your suggestions. Let's not just lock opposition here today—

Mr. SCHMIDT. Well, I hear you on that.

The CHAIRMAN [continuing]. And just say nothing can be done because it is going to cost the taxpayers money. If it costs the taxpayers money, that is a good thing because it may make the Fed-

eral Government a lot more reticent to go and swipe property of common, ordinary citizens like Nellie Edwards or literally thousands of people like her across this country who feel like the government is intruding upon their very most important rights. That is all I am saying, so I will take your good faith that we will work together.

Mr. SCHMIDT. I hear you on that. I do want to just make one comment on the Americans With Disabilities Act example. That is not an example that we have pulled out of a hat. We had a case where it was an International House of Pancakes which asserted that the ADA requirement to provide access to its bathroom facilities for the handicapped resulted in a reduction in the value of its restaurant, and therefore sought compensation from the Government.

Now, as I read this bill, if that International House of Pancakes could show that that, in fact, resulted in a reduction on any portion of its property—

The CHAIRMAN. Of a third or more.

Mr. SCHMIDT. Any portion of its property, though, presumably limited even to a part of a restaurant, if you read those words to mean what they say. That International House of Pancakes would win that case.

The CHAIRMAN. Well, what happened to the case?

Mr. SCHMIDT. They lost because the court said—

The CHAIRMAN. Who lost?

Mr. SCHMIDT. The International House of Pancakes lost—

The CHAIRMAN. Well, that is my point.

Mr. SCHMIDT [continuing]. Because the court said that under the other factors which this bill rules out—the question of is this a form of regulation that is achieving a generally acceptable purpose and falls within a range of generally accepted permissible regulation—we are not going to allow compensation, which is the result the courts would reach today under a large range of Federal regulation.

But this bill makes no such distinction. This bill says if there is a reduction of any value of property or any portion of property—

The CHAIRMAN. Of a third.

Mr. SCHMIDT [continuing]. Of a third or more, you get to be compensated. It was the Cato Institute witness who testified before the House that, as I say, one of the reasons he liked the bill was that it would bring ADA enforcement to a halt. So we are not trying to generate horror stories here, but we are trying to describe in I hope an accurate way what we see as consequences.

The CHAIRMAN. But as one of the authors of the bill, I think that is a horror story because I don't think the courts are going to interpret this law in that fashion to do away with ADA, in spite of what the Cato libertarian representative felt. There are people who feel that the ADA is an intrusive, oppressive bill. That is their right.

Mr. SCHMIDT. Well, then they should repeal ADA. That is the point I was making. It seems to me the answer is to focus on forms of regulation you don't like, but if you put into law a kind of abstract principle and say this applies to every piece of regulation, you really do run, I believe, the risk that I was describing earlier.

The CHAIRMAN. With regard to ADA, you and I agree on that, and the fact of the matter is that is why we wrote the third or more principle in this. But like I say, let's work together. Let's see if we can come up with something that really protects honest, decent, law-abiding Americans who are getting stifled by the Federal Government in many cases, and especially on wetlands issues and on a large variety of environmental issues, and who are complaining to us all over this country. Let's see if we can resolve these problems. I will be happy to work with you.

Mr. SCHMIDT. We are willing to work with you on that, Senator.

The CHAIRMAN. Well, we appreciate it.

Senator Biden, we will turn to you.

STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you very much. I apologize, Mr. Chairman, for being late. As you know, there was an emergency caucus called to see if we could agree to an offer made by Senator Dole on this legislation before us today and it did not end until 10:30. I left early to come over here.

I had an opening statement, which I will, in my time, make reference to as we go through, but let me go back to the IHOP, as they say in the ads, example, the International House of Pancakes.

The point, I understand, General, that you were making is that if, as this bill reads, the restroom in question was considered to be a distinguishable part of—if they identified the portion of the property that the restroom took up as the only focus of whether or not it was being, in fact, impacted on by a third, then, in fact, we would have had a different ruling.

If it says that when you look at the entirety of the property that International House of Pancakes owns, wherever they have their facility, and the restroom does not make up a—they don't focus on that portion that makes up only the restroom; they focus on all of the property. It is unlikely to affect a third of the property, so it might not fall within it. Is that the point you were making?

Mr. SCHMIDT. Yes, that is correct, and the doctrine the courts have applied, contrary to this bill, for quite a while, particularly since the *Penn Central* case decided by the Supreme Court, is you look to the aggregate of the property owner's interest, not to a single portion of it. It comes up much more often, obviously, if you are talking about raw land and you have an impact on 1 acre and you have got another 99 acres. But there is nothing in this bill that would limit the application of that doctrine even to the kind of circumstance that we are talking about with the House of Pancakes.

The CHAIRMAN. Well, let's look at—and before I finish, I am going to give this statement because I think it is important to put it in context. It is relatively short, but let me follow up on a few things that the Senator asked you first.

He gave the example of toxic waste going into the streams, and that would be a common law nuisance and therefore we would be able to act to stop it. But let me give you a slightly different example so I understand the degree to which, if there is any degree to which, this legislation changes the present jurisprudence on the issue of takings.

The right of private property owners is protected by the fifth amendment, as we all know.

Mr. SCHMIDT. Yes.

Senator BIDEN. We don't all know. Most people think the fifth amendment relates to self-incrimination when you ask them, but it has taken on a whole new jurisprudence, led by some brilliant legal scholars like Epstein out in Chicago and others who argue that we should essentially take the 14th Amendment jurisprudence, in my view, that was discarded in the 1930's and apply it to the fifth amendment by giving a different view of the Takings Clause. But it says, "Nor shall private property be taken for public use without just compensation."

Now, today, the proponents of the legislation that we are meeting here to discuss assert that this clause of the fifth amendment is not being taken seriously—Senator Hatch has made that reference—and that property rights do not get the respect they were intended to get under the fifth amendment.

I agree with the view that respect for property rights is the core foundation of our society. I think it is hard to disagree with that, but I have great reservations about suggesting that the Takings Clause of the Fifth Amendment means that property rights are inviolable under all government actions. I very strongly disagree that property rights should be given the kind of superstatus they are accorded in this bill today.

Let's look again at the language of the fifth amendment. It does not say the Government may take no action that infringes upon a person's property rights. The fifth amendment only requires that just compensation be paid if the Government takes private property. Rather than precluding the taking of private property, this language presumes that the Government will take property and it recognizes that the Government has the right to take property.

As the Supreme Court has explained, the Government's right to take private property for public use is the right, obviously, of eminent domain, the thing that most people think about, and it, "appertains to every independent government, it requires no constitutional recognition, and it is an attribute of sovereignty." That is *Boone County v. Patterson* decided way back in 1879.

Now, in addition to the eminent domain power, the government has a right and a responsibility under the police power to regulate the use of private property to promote public welfare, particularly in the area of health and safety. With these general parameters in mind—that is, promoting public welfare in the area of health and safety—private property may not be taken without just compensation, and Congress enjoys the power to enact legislation to promote public health, safety, and welfare. Those are the two things that we are told.

Now, let's examine the effect they will have on this bill, and that is what I want to talk to you about. What does it mean to take private property? Well, the Supreme Court has made it clear that people, through their elected government, may regulate the use of private property without it arriving at a taking, even though it affects the value of the property and even though it takes property from the individual; that is, when property is regulated for the public good, for public health and welfare, no compensation is required.

The Supreme Court has developed a body of law around the question of constitutional takings. Very oversimplified, the Court has held that no taking occurs where a regulation promotes health, safety, morals, and government welfare. Or, put another way, a regulation is permissible if it substantially advances a legitimate government interest. At the same time, the Court instructs that there may be a case in which a property owner suffers so much loss of economic value that justice and fairness require compensation.

Over the years, the Court has declined to articulate a bright line rule, and instead it has focused carefully on a case-by-case basis on specific facts before it has determined how to apply the standard I have just mentioned.

This bill, it seems to me, turns taking jurisprudence upside down. First, it declares that property owners need no longer be content with compensation. It authorizes a court to invalidate an act of Congress or of an executive department that, "adversely affects private property rights in violation of the fifth amendment."

This is a remedy not contemplated by the fifth amendment itself nor anywhere else that I am aware of in the Constitution. It is a considerable grant of authority to the courts. Indeed, it is nothing short, in my view, of the surrender of the Government's sovereignty right over eminent domain and an abdication of its responsibility to protect public welfare to the courts to make a determination whether that is the case.

Second, the bill would ignore the Supreme Court's definition of a taking and redefine what is a compensable taking. In doing so, the bill takes language used by the Supreme Court in very narrow, fact-specific contexts and converts them into sweeping new standards that would govern all claims on takings.

For example, in the *Nollan* case, which most would argue was decided correctly, the Supreme Court spoke of whether the regulation at issue would substantially advance the legitimate state interest, a very high standard of review that the Court determined was reasonable, "under the specific facts of *Nollan*."

Where the condition at issue was to allow the public the right to pass over part of an owner's property, because the right to exclude is an essential attribute of property ownership the Court chose to use this high standard of review. The Court has not said, though, that the high standard would be appropriate in all cases.

Similarly, the bill defines a compensable taking to include any agency action that, one, deprives the owner, even temporarily, of economic, beneficial, or productive use of a property, or that part of a property affected by the action, or diminishes the fair market value of the affected portion by 33 percent or more.

The courts now look to the effect of the regulation on the parcel as a whole in assessing the owner's economic injury and judging the burden of regulation by looking at the owner's entire property to be fair and reasonable. Now, when they look at that right now, one of the things that I think underlies this legislation is the following. If the U.S. Congress, for example, were to pass a law saying that we know that CFC's deplete the ozone layer—and there is very little argumentation on the part of any scientist that I am aware of today that says CFC's being emitted into the air, in fact,

reduces the ozone layer, and that is a bad thing for the population of the world at large and Americans, in particular.

Now, let's assume I have a refrigeration company, the Biden Refrigeration Company, and a third of the value of my property is that portion which provides refrigeration and uses a method whereby CFC's are emitted into the air. By the passage of this legislation, a regulator comes along and says to the Biden Refrigeration Company, you can no longer engage in the method of production that you use because the products you are using to provide for the refrigeration cause the emission of CFC's into the atmosphere and that ain't good, so we are going to require you to find another method or shut down, and it affects a third of the value of my company.

Now, as I understand it, under the present law what the court will look at in determining whether or not this is a legitimate government action is basically whether or not there was a reasonable basis upon which the Congress made that judgment, whether or not they were able to prove—by a tort standard or a nuisance standard, were able to prove that it is reasonable that those legislators concluded that it will help the environment if we stop emitting CFC's.

But as I read this bill and listen to my friend from Utah, there would be a different standard that the court would have to apply. The court would have to say, now, let's see, does this rise to the standing of a tort action, the same burden of proof you would have to use in a tort action.

Won't the Government in this circumstance have to prove, if this bill passes, that the Biden Refrigeration Company that is emitting CFC's into the air—that to shut me down, the Government can do it, but they have to compensate me for doing that, or they have to prove that what I am doing amounts to a common law tort?

Mr. SCHMIDT. I think that is correct, Senator. Unless they could fall within that exception for activity that violates a State law nuisance doctrine, the Federal Government would have to pay compensation to you if there is a reduction in the value of your property of a third or more.

Senator BIDEN. Now, I want to make sure that I don't misstate this and that I understand it. To establish a common law tort standard, what would the Government have to prove to justify the regulation of saying no CFC's emitted into the air, assuming the Government passed such a law?

Mr. SCHMIDT. Probably some immediate noxious impact upon the neighboring property of one sort or another. I mean, it is that kind of a standard.

Senator BIDEN. Wouldn't it have to prove that there was injury to specific individuals?

Mr. SCHMIDT. Right.

Senator BIDEN. I mean, when the ozone layer is depleted, that causes cancer in people, and they can name so-and-so and so-and-so and so-and-so have gotten cancer from that action that I have taken by emitting CFC's into the air.

Mr. SCHMIDT. Yes, right.

Senator BIDEN. It is almost an impossible standard, it seems to me, for many of the environmental laws that we already have. For-

get wetlands for a minute. There are a lot of companies, for example, that produce CFC's, so basically what we say if we had such a statute—I am deliberating picking a statute we don't have so I don't get into a lot of extraneous debate about a particular statute, whether it is good or bad.

What would happen, as I understand it, is that the Congress, in this case, who passed the law would have to set aside and decide that if the public wanted to be protected from the depletion of the ozone layer, we would have to compensate all those people who now emit CFC's in the air. I am not saying they are bad folks. I mean, this was a process, we are only learning, causes serious damage to the environment and, in turn, to us.

They would have to go out there and set aside a fund to compensate everybody whose property was impacted upon by a third or more who produced CFC's. If that is true, we are talking about a multibillion-dollar cost, a multibillion-dollar cost.

Mr. SCHMIDT. I agree with that. As I said, in the one estimate that anyone has come up with related to one particular statute, the GAO came up with \$10 billion, but that is only one statute in one particular area.

Senator BIDEN. Well, that is what I am trying to pick. Now, let me ask you, if I understand as well, as you read this statute, would the cost to the Biden Refrigeration Company that was compensable be the amount of money that that division represented for me at the moment or future profits that I would make and could articulate and lay out in the outgoing years? How would you make that judgment?

Mr. SCHMIDT. Well, you would look at the value of your property, which presumably, I guess, would reflect the discounted value of that future stream of income. So if you reduce your ability to produce profitably at a certain level, you are going to reduce the value of the property and that is what the lawyers would argue about. But, clearly, it would be a very large amount in the case you describe if that was central to the business.

Senator BIDEN. Well, let me give you another example. Right now, we pass laws, and maybe we shouldn't, but we pass laws—for example, the Clean Water Act—that say if an effluent that comes out of a pipe out of my factory or my home or anywhere has more than several parts per billion of a carcinogenic substance in it, then I can't emit that. Don't hold me to the precise number, but they are parts per billion we measure them in.

We, the Congress, and the Congresses of 20 years ago, said we want our water clean enough that you cannot emit into the environment, into a stream, into a river, or into the water aquifer, a substance that, in fact, contains more than "x" parts per billion of a carcinogenic substance.

Now, I don't think most people understand when we talk about taking; they think when we say takings we mean someone is going to go in, like the highway department, and they are going to put a four-lane highway through the middle of your house or the middle of your property and they are taking your property. Or there is a wetlands regulation and they say you can't grow corn on this piece of property because flora and fauna from 300 years ago would

have grown that would make it a wetland. Therefore, you can't use it, so you are deprived of the value of your property.

But there are other kinds of takings when we require through a regulation an industry or an individual to take money out of their pocket to engage in technology, to put something on the end of that pipe that takes the carcinogenic substance out of that water or out of that liquid before it goes into the environment. That costs money, so that is a taking, right?

Mr. SCHMIDT. Yes; I mean, the question is whether it is a taking in the constitutional sense, but it could be.

Senator BIDEN. That is what this bill is talking about.

Mr. SCHMIDT. Right.

Senator BIDEN. We are not just talking about whether or not there is a taking or a regulation as it relates to the use of a physical piece of property.

Mr. SCHMIDT. No; we are talking about regulatory actions.

Senator BIDEN. A taking or a regulation is also arguable in terms of costs required of individuals and companies to take actions to clean the environment to the point that the executive branch of the Government or the legislative branch of the Government says they must do it, correct?

Mr. SCHMIDT. Yes.

Senator BIDEN. Now, what happens if there is a—right now, as I understand it, the courts have basically looked and said, look, we are not going to second-guess whether 2 parts per billion or 20 parts per billion is required to do damage to environment and individuals. They have basically given pretty wide latitude to legislators, allegedly reflecting the view of the public at large, as to what they believe constitutes clean water, right?

Mr. SCHMIDT. Right.

Senator BIDEN. Now, as I understand this bill, it is consistent with Professor Epstein. He did not write the bill. I am not saying that, but the school of thought that believes we should change the jurisprudence, either legislatively or through the courts, as it relates to what constitutes a taking versus a regulation.

The court would be required to apply a different standard, would it not? It is not merely whether or not it was reasonable for the Congress to pass such a law and whether or not that really does or doesn't protect the public health, but they would have to apply a standard that would amount to a nuisance standard, at a minimum, or a tort standard, wouldn't they?

Mr. SCHMIDT. Well, yes. What the bill imposes is a one-third requirement. Professor Epstein probably wouldn't accept a third; he would probably go down to—

Senator BIDEN. I am going to get to that.

Mr. SCHMIDT. But, basically, what the bill says is if the regulatory impact reduces the value of the property by a third or more, then regardless of those other factors, there is a taking which requires compensation.

Senator BIDEN. So if the company comes in that is taking this effluent from a process by which they make widgets and says the cost of adding on the containment vessels we need to meet the standards of the Clean Water Act equals a third of the value of our property, now what standard has to be applied under the bill by

the court to determine whether or not this is a legitimate regulation or a taking, as you read it?

Mr. SCHMIDT. Well, again, I think the question would be whether the impact of that regulation is to reduce the value of the property by a third or more.

Senator BIDEN. Right.

Mr. SCHMIDT. That might not be exactly the same as the cost of doing whatever it is the Government requires. I guess it would be a test of—

Senator BIDEN. I mean, I can think of circumstances where, if you were required to take the action the Government is asking for, you, in fact, are going to reduce the market value of your property by a third. So help me out here, professor. Let's stipulate that that is what it will do, OK?

Mr. SCHMIDT. Right.

Senator BIDEN. Now, once it has done that, if that is the case, what happens?

Mr. SCHMIDT. That property owner is entitled to recover compensation from the Government.

Senator BIDEN. Period?

Mr. SCHMIDT. Yes, period. I mean, this is an across-the-board test. It has the advantage of simplicity.

Senator BIDEN. My time is expired. I will come back for a second round, if I may. Thank you very much.

The CHAIRMAN. Well, let me just move to Senator Grassley, but before we do, let me just say that I think the nuisance exception will cover CFC emissions into the air. That would be a nuisance. Now, true, the Government must demonstrate some harm before the exception will be given effect, but that is what this bill is about; that is what the fifth amendment is about.

This bill in no way would go as far as Professor Epstein would go. I mean, we are not attempting to do that. We are trying to follow, really, the *Lucas*, *Nollan*, and *Dolan* cases.

Senator BIDEN. Senator, may I ask you a question? Does it require to demonstrate harm to an individual? Most nuisance standards require you to demonstrate harm to an individual.

Mr. SCHMIDT. Nuisance is a tort law. Somebody has to show that they are directly harmed.

Senator BIDEN. Right.

Mr. SCHMIDT. I mean, I can't go and recover on a nuisance theory for somebody—

Senator BIDEN. Excuse me. I am not asking you, General. I am asking the Senator what he means by—

The CHAIRMAN. Well, it covers public and private uses, and certainly if you can show harm to an individual—

Senator BIDEN. But you have to show harm to an individual to establish nuisance.

The CHAIRMAN. Yes, but there are various ways of showing harm. It is not impossible to do so. What I am saying is this doesn't go nearly as far as what you are indicating by quoting Professor Epstein. That is not our goal here.

Senator BIDEN. I made it clear that Professor Epstein didn't say this. I am talking about the overall philosophy.

The CHAIRMAN. I agree.

Senator BIDEN. If you will just indulge me 30 more seconds, the ability to prove that the ozone layer depletion has caused harm to a specific individual is overwhelmingly difficult to do. Yet, no one questions that depletion of the ozone layer has a fundamentally negative impact on humankind. Therefore, it is a different standard, very difficult to meet.

The CHAIRMAN. Well, maybe the Government is going to have to meet it. I mean, you know, maybe that is just the way life is because there are a lot of differences as to whether that applies or not.

Senator BIDEN. I appreciate your answer. Thank you.

The CHAIRMAN. Now, let me also just say one other thing and then we will go to Senator Grassley. As to the partial taking, the 33-percent level, the *Lucas* Supreme Court case left that issue up in the air and left it open, and the Federal circuit court in the *Florida Rock* case created a balancing test to determine what is, "partial taking." All we are trying to do is tell the Supreme Court what it is, and we think it is time that we defined that so that citizens aren't just robbed day in and day out. Somebody has to define this because the Court is not doing it, and it is probably appropriate that it doesn't do it. We have an obligation to do it, and that is what this legislation is all about.

Senator Grassley?

Senator GRASSLEY. I don't think I have any questions, Mr. Chairman, but I do want to say something at this point.

The CHAIRMAN. Sure.

Senator GRASSLEY. I have listened to a lot of discussion of this not only in this environment, but in a lot of other environments in the last year. Although I know our Constitution does not differentiate property rights from big corporations or little individuals—they are all treated the same—I think there is a case trying to be made over the last couple of years on this issue by opponents of it that this is nothing but an effort to protect corporate polluters and to encourage corporate pollution.

The fact of economic life in America is that big corporations probably are as unaffected by the issues we are trying to get at in this legislation than anybody because they have the capability of passing on costs to the consumer and they have got the capability of hiring the big law firms to defend themselves when they have to defend themselves.

For the individual or the small self-employed person, a government judgment that deprives economic use of property can be a life-or-death situation because they can't pass on costs to the consumer or they can't afford the very expensive legal counsel that it takes to defend a situation or to protect rights.

I see this legislation as extremely important to people in my State because in my State over 98 percent of the land is privately owned, and I don't think there are more than two or three other States that have that high of a percentage of privately held land. So virtually every government regulation in some way affects the ability of land owners, particularly in my State, to use their property.

I think this legislation helps to relieve the regulatory burden on individuals. Simply stated, I think it strikes a balance between the

public good and the desire to protect private property rights, and I think today I see the deck just extremely stacked in favor of the Government and against property owners; particularly, the smaller they are, the more so. The intimidation of a Federal bureaucrat gets individuals and small business people in this country just to knuckle under, and it shouldn't be that way.

Now, I know opponents of this bill are arguing that the Constitution already protected the rights of private property owners. But you have got to be able to make use of the courts to get this done, and I think Chief Judge Smith points out very well today that a petitioner seeking to invoke these constitutional protections faces both jurisdictional and procedural hurdles that are not very easily overcome.

Just some CRS statistics, reporting for 1993: of 31 Federal court decisions on takings issues, only 2 were decided in favor of property owners. Litigation under the Takings Clause is extremely expensive and time-consuming to do, and hence very costly. Aggrieved property owners are effectively barred from judicial remedy due to the cost and time involved in their case.

I think the proposed legislation will clear this up by giving us a clear standard, by eliminating jurisdictional hurdles, and by expediting the process in favor of the land owner who has suffered a taking. I think the bill will force agencies to consider whether their actions affect the use of private property.

I think just this bill's impact upon the thought process and the culture of decisionmaking of our bureaucracy is the most beneficial impact. I think it is going to force some common-sense approaches to regulation writing, and just the institution of a little bit of common sense in public policymaking in America, particularly in a bureaucracy where there isn't an interaction between the people affected and the policymakers, I think would be such a good discipline to institute upon government.

This bill does not in any way turn back the clock of the gains that have been made in environment or safety legislation or a lot of other things. Critics of this legislation arguing that the Government will be forced to pay polluters to comply with environmental law and somehow awarding bad actors just can't be given paramount position when such government action doesn't really hurt these bad actors like it really impacts negatively upon the law-abiding individual, the little guy of America and the self-employed person or the ma-and-pa operations of America. I think our common law nuisance approaches to taking care of these problems are going to see that that doesn't happen. So I think, Mr. Chairman, this bill is sorely needed to bring common sense to the promulgation, and most importantly the enforcement of those regulations.

Mr. Chairman, I would ask that my entire statement be included in the record.

The CHAIRMAN. It will be included in the record.

[The prepared statement of Senator Grassley follows:]

PREPARED STATEMENT OF SENATOR CHARLES E. GRASSLEY

I thank the distinguished Chairman, Senator Hatch, for introducing S. 605 the Omnibus Property Rights Act of 1995 and for calling this hearing. I am pleased to be an original cosponsor of this important piece of legislation.

This legislation is extremely important to the people of my state. In Iowa, over 98 percent of the land is privately-owned. I believe only 3 other states have a higher percentage of privately-held land. So virtually every government regulation in some way affects the ability of a landowner to use their property.

The people have grown tired of the increasing regulatory encroachment on their everyday lives. The plea I hear most often when I return to Iowa is "Get the government off our back." I believe that sentiment was the driving force behind the November 1994 elections. I also believe that my party will have a difficult time maintaining its majority status if it does not pay careful attention to this sentiment.

This bill helps relieve the regulatory burden on individuals in three important ways. First, it provides for compensation to landowners whose property is taken or devalued by 33 percent. Second, it forces agencies to analyze proposed regulations as to the likelihood that the regulation will result in a taking. And third, the bill makes it easier for aggrieved landowners to seek remedy from the government in federal court.

Simply stated, the legislation strikes a balance between the public good and the desire to protect private property rights. Currently, the deck is stacked in favor of the government and against property owners.

Opponents of the bill will argue that the Constitution already protects the rights of private property owners in the Fifth and Fourteenth Amendments. However, for the reasons pointed out in the testimony we will hear from Chief Judge Smith, a petitioner seeking to invoke these constitutional protections faces both jurisdictional and procedural hurdles that are not easily overcome. In fact, CRS reports that of 31 federal court decisions on the takings issue in 1993, only 2 were decided in favor of the property owner.

Moreover, litigation under the Takings Clause is generally more expensive and time consuming than other types of litigation because of its fact-intensive nature and lack of clear judicial standards. Thus, many aggrieved landowners are effectively barred from a judicial remedy due to the cost and time involved in trying their case. This proposed legislation sets a clear standard, eliminates jurisdictional hurdles and expedites the process in favor of the landowner who has suffered a taking.

The bill also will force agencies to consider whether their actions affect the use of private property. This requirement will result in more innovative regulations that both promote the public good and limit the infringement of the government on property rights.

This bill does not turn back the clock on the gains we have made in the last two decades in improving the environment. Critics of this legislation argue that the government will be forced to pay polluters to comply with environmental law, thus rewarding so-called "bad actors." This is simply not the case. No compensation will be paid for activity that constitutes a common law nuisance.

In closing, this bill is sorely needed to bring back some common sense to the way agencies promulgate and enforce regulations. It is also needed to give the aggrieved landowner a fighting chance against a government that has failed to uphold the sanctity of private property rights.

The CHAIRMAN. I said that we would go to Senator Feinstein next, and then we will go to Senator Leahy.

STATEMENT OF HON. DIANNE FEINSTEIN, A. U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Mr. Chairman, all of my adult life I have fought for property rights. I did it as a member of an air pollution control district in the Bay area of California. I did it as a member of the Coast Commission. I did it as a member of the Bay Conservation Development Commission. I did it for 9 years as a county supervisor, and I did it for 9 years as mayor of San Francisco in turning down every single request for eminent domain that ever came before me, no matter how civically-oriented that was.

But I must say, Mr. Chairman, I believe this is a bad bill. I will fight it every way I possibly can, and I want to suggest to you why. It should be no coincidence that the National League of Cities opposes this bill. The National Conference of State Legislatures op-

poses this bill and has made the statement that this bill would severely limit government's ability to meet the public's demand for a safe and clean environment. I believe this bill will do just that, and I think it has to be said and said plainly.

After a long career, I don't intend to come here and vote for a bill that pays polluters to pollute, and I believe this bill does just that. I have worked all my life to try to develop on a local level sane, common-sense solutions to real problems.

I recognize that there are individual property owners that feel aggrieved. I recognize them. I recognize government makes bad decisions. I recognize individual agents of government can do the wrong thing, but this bill is overkill. I have just got to say it, bottomline and simply, it is overkill.

Now, I would like to ask some questions. Let's go to some areas that are not on the table. Let's go to an area big in California, water, and I want to ask some questions as to what this bill does with respect to water rights. The Department of the Interior and many others point out that this bill would change the definition of property to include the right to use or the right to receive water.

In my State, after years of negotiations between competing interests, the administration and the State of California recently entered into a landmark agreement concerning water quality for the San Francisco Bay delta estuary. This is two-thirds of the drinking water for the 32 million people in the State of California.

Under this agreement, certain water users agreed to have their water allocations reduced to provide increased water for the State's fish and wildlife population over the next 3 years. This was a voluntary agreement where people voluntarily surrendered some of their water rights to meet what were aggravated problems—increased salinity into the water of the bay, increased diminution of fish flows, and so on.

I believe that under the current law, the Government would not have to pay farmers or anyone else if their water supplies were reduced pursuant to this agreement. The question I want to ask is, under this bill it is my understanding that, say, Central Valley farmers who voluntarily agreed to have their water allocations reduced—under this bill, the Government would have to pay them for that. Is that a correct analysis?

Mr. SCHMIDT. Well, I am not certain if they actually voluntarily agreed to do it that that in and of itself would require compensation. If they were in any sense compelled to do it, then clearly, given the expansive definition here that includes the right to use water in the definition of property and says whenever there is a reduction in the value of any property by a third or more, or otherwise a regulatory taking, they would have to be compensated. If they actually voluntarily agreed to do it, I am not certain that—

Senator FEINSTEIN. So water rights would be private property under this bill?

Mr. SCHMIDT. Yes, that is clearly correct.

Senator FEINSTEIN. So any change by government in water rights could impact this bill?

Mr. SCHMIDT. Any compelled change, right.

Senator FEINSTEIN. If this change in the agreement that was negotiated were a compelled change by government, do you have any idea of what the cost might be?

Mr. SCHMIDT. No, I don't. You know, you can come up with figures, and frankly I think you get up into the billions and then you kind of stop precise counting.

Senator FEINSTEIN. I have seen estimates of just this one instance of the cost being \$1 billion, and I would like to ask if your department would take a look at that and indicate what the cost would be.

Mr. SCHMIDT. We certainly will do that. A number of the departments have been looking to try to come up with cost estimates if this bill would pass. It really is very difficult because you are into a whole range of predictions, really. So the best thing you can say is it is a huge figure and it is an unpredictable figure, but we are trying to come up with more precise figures and we will get you those.

Senator FEINSTEIN. So just so I understand correctly, any governmental change in water rights would be considered a taking and would be reimbursed under this law. Is that correct?

Mr. SCHMIDT. Well, water rights, yes, would be a form of property and government action to take away that right would be compensable under the bill.

Senator BIDEN. Would the Senator yield for an explanation on that very point?

Senator FEINSTEIN. Yes, I would be happy to, but I would like to finish.

Senator BIDEN. The key the Senator is referring to is if there is a contractual right—this is the first bill that I have ever seen that takes a contractual right—in this case, years ago the folks in California signed a contract with the government that they would get “x” amount of water. Any change in that contractual right engages this bill if it reaches the threshold this bill requires.

Mr. SCHMIDT. Yes; an involuntary change in that contractual right would engage the bill, and the contractual right itself is included within the definition of property.

Senator BIDEN. So the property is the contractual right. That is the right. It is not just that they own the property; it is that they have contracted with the Government 10 years ago, or what we did years ago when we passed legislation that was designed to help the West. We made contracts as the Government with the folks that they would get so much water; in this case, for example, water. There are other cases. That is a contract. We change that by more than a third of the value of what that contract effects, and it is not voluntary, then it is compensable.

Mr. SCHMIDT. That is correct.

Senator FEINSTEIN. Would that include basic riparian water rights?

Senator BIDEN. Not necessarily, unless there was a contract. For example, it wouldn't include basic riparian water rights. The Delaware River flows down and we can take water out of the Delaware River. There is no limitation on what we can take out—well, that is not true. The Delaware water basin does have—

Senator FEINSTEIN. That is right; most do.

Senator BIDEN. The answer is it probably would.

The CHAIRMAN. But that is why you have compacts, and we have been able to work those things out in the West. You know, these are kinds of horror questions. You can bring up any horror questions you want.

Senator BIDEN. If anybody affected by the compact says I don't like it, you have just given them a cause of action. Up to now, if one single farmer says I don't like it, he is in court.

The CHAIRMAN. We don't agree they don't have a cause of action. The point is we define what that cause of action is, and for the first time in a way that people's rights can be protected. We stop this helter-skelter government control of everybody's lives. That is what is involved here.

Are you through, Senator Feinstein?

Senator FEINSTEIN. No, I am not, Mr. Chairman.

The CHAIRMAN. OK, but we are going to have to limit the time because we have got a number of other witnesses.

Senator FEINSTEIN. I am happy not to take any more time than my colleagues do, but this is a bill about which I feel strongly and I would appreciate being afforded equal time to my colleagues.

The CHAIRMAN. I am happy to give you more time. The next round is going to be 5 minutes each.

Senator FEINSTEIN. I thank you.

I have been intrigued by the fact that the National Rifle Association is in support of this bill, and I would be curious as to how this bill would impact weapons. If you could enlighten me, I would appreciate it very much.

Mr. SCHMIDT. There was a case a few years ago where a ban was imposed upon the sale of assault rifles—this is not the recent situation—and a property owner sought compensation on the grounds that that reduced the value of his property, which included an inventory of those rifles. He lost because the court said that under the current standards that was regulation designed to achieve a general public interest that was permissible. It didn't have the other kinds of consequences that would be compensable under current law.

Under this bill, in that kind of situation, the person with the inventory of rifles which were declared to be illegal would presumably be entitled to compensation if there was a reduction in the value of his property by a third or more.

I actually was not aware that the National Rifle Association was supporting this bill. If they are, it is possible that they view it as providing some sort of an inhibiting or deterrent effect toward any future regulation and the ability in those circumstances for them to get compensation or to prevent the regulation from going forward because the costs would be too great. That may be what they are focusing on.

Senator FEINSTEIN. Let me ask you this question. I authored the assault weapon ban in the U.S. Senate last session. This ban prohibits the sale and the manufacture of assault weapons. It is prospective. Would this mean that, let's say, a manufacturer—assault weapons was a third of his take. Let's say in a gun store the sales of assaults weapons in the past were at least a third of their take.

Would they have a claim of action for reimbursement against the Federal Government if this bill were to pass?

Mr. SCHMIDT. I think they would if they could show that the impact of that regulation was to reduce the value of their property by at least a third.

Senator FEINSTEIN. Thank you very much. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman. I must say I find what the Senator from California said to be very persuasive. I know that she has spent a great deal of time on this both as a member of the Senate and before that as chief executive of one of our country's largest and most significant cities, and I would hope that we would all pay attention to her comments.

I worry because I have spent a great deal of time in this Congress really trying to uphold our Constitution. We feel that in this country we take great pride in the fact that we have a wonderful Constitution. We have only amended it 17 times since the Bill of Rights, but suddenly since the elections last year we find the need to look at almost 100 measures to amend our Constitution.

Each House of Congress has been called upon to vote on constitutional amendments that would undercut majority rule. We seem to feel that what has worked well for democracy for 200 years stopped working on election day last year and now we have to make all these changes. I am not sure that we are so much better equipped to make these changes than the Founders of our country were, and I would hope that we might slow down just a tad here in the Senate and look at some of these things.

S. 605, the so-called Omnibus Property Rights Act—I mean, all these things have wonderful names. You could just see the bumper stickers and the 30-second ads saying what they are, and maybe it is the MTV generation and we are not supposed to think of anything beyond the first four or five words. It is like the cover of a book which looks very nice and when you read the book it is something entirely different, and that is what happens to be here.

This bill appears to be an effort to impose tremendous and unprecedented costs on taxpayers to protect our environment and our way of life and our future. This raises a great deal of concern in my own State, where we are a small State, not with a great deal of money, but we try to have a quality of life and an environment second to none. We are concerned about what that would do here in our State.

I think the principal beneficiaries of the claims and lawsuits intended to be created by this bill, and there will be—I mean, it will open the flood gates on claims and lawsuits. The ones who are going to get the benefits will be the well-to-do, the landed interests, wealthy developers, and corporate interests. I realize that they contribute heavily to campaigns, but that is no reason why they should be able to write the legislation, too.

Some of the people, though, who support this are the same ones who are intent on closing our courts and restricting our regulatory agencies in ways that will prevent them from protecting the health and safety of individuals. You say we will close the courts, we will close the regulatory agencies so they can't do anything to protect

you, and we will get rid of any other protections by just tying you up in court.

I see the taxpayers getting nailed on this. I see the deficit going up as a result of this, and in that regard, Mr. Chairman, I want to commend Associate Attorney General Schmidt. I have read his statement. I think it is an outstanding one. It explains in detail a number of the flaws in this type of legislation, and I am glad that we have something on the record that points it out because what Associate Attorney General Schmidt is talking about is real things. He has gone way beyond the rhetoric; he has gone to the reality.

What I am concerned with is that we seem to be legislating by rhetoric and not legislating by reality. He speaks of real changes to improve the way our Government works, and so, Mr. Schmidt, I am delighted you took the time and I appreciate your doing that.

I think the questions have been asked, Mr. Chairman, so I am not going to ask questions on this, but I would hope that everybody has listened to what he has said. This sounds great in the debating clubs, but it is going to be a lawyer's dream.

Thank you.

The CHAIRMAN. Well, thank you. I would like to go to the next panel, and I would hope that we could submit questions to you, Mr. Schmidt.

Mr. SCHMIDT. Certainly.

The CHAIRMAN. I personally appreciate your willingness to work with us to see if we can satisfy the administration on some of the language in this.

Senator BIDEN. Don't leave, Mr. Schmidt.

Mr. Chairman?

The CHAIRMAN. Yes?

Senator BIDEN. I have questions that I would like to ask of Mr. Schmidt. This is a fundamental change in the law, maybe warranted, but I hope we are not going to do here what we did on the other thing, have one day of truncated hearings on this issue—

The CHAIRMAN. No; I think we will have more.

Senator BIDEN [continuing]. And then hear we are going to go to a markup after that. So I have some questions of Mr. Schmidt I would like to ask about zoning, if I may, on a second round.

The CHAIRMAN. Could we limit the time that we take so we can get through with all the other witnesses?

Senator BIDEN. I promise you, if you find any question I ask to be repetitive or not to be on point, then you say so and I will withdraw the question.

The CHAIRMAN. Well, let me just limit it to one more round and we will limit the questions to 5 minutes, and I will give you my 5 minutes so you have 10. How is that?

Senator BIDEN. Well, Mr. Chairman, you are the chairman and you can do what you want.

The CHAIRMAN. Well, I don't want to cut off the ranking member.

Senator BIDEN. Well, if you don't, then don't.

The CHAIRMAN. Go ahead, go ahead.

Senator BIDEN. Mr. Schmidt, let's talk about zoning.

The CHAIRMAN. But we do have a lot of people here to testify.

Senator BIDEN. I understand that, and I want to hear from them all. I want to ask similar questions of them.

Now, right in the city of Washington, DC, there is a zoning law. It says that no one can build a building that is higher than the top of the dome of the Capitol. If I own a prime piece of real estate in the city of Washington and I have a contract and I can demonstrate that I have the financing to build a 75-story building, which exists in almost every major city in America, and I will be able to show that the 3-story building I now own on Pennsylvania Avenue is worth a whole heck of a lot less to me than the 75-story building—I will have no difficulty establishing that a third of the value of my property is affected by the zoning law that exists in Washington that says you can't build a building higher than the dome of the Capitol.

Under this legislation, what would the government of the city of Washington be required to do to keep me from building a 75-story building, assuming it met every other code requirement in the law—sprinklers, safety, the whole works? The only difference is it is 75 stories and not 5 stories.

Mr. SCHMIDT. Well, I think, assuming it were a new law that was being applied to you or a regulatory action, and assuming this bill covered it, then——

Senator BIDEN. No, that is not——

Mr. SCHMIDT. I mean, if it is a preexisting law that has been in place for a longtime, I am not sure——

Senator BIDEN. Then this law does not apply to it?

Mr. SCHMIDT. Yes; I don't think this is saying that you are entitled to compensation for everything that you could go back and say you might have been able to do if an existing law were not in place.

Senator BIDEN. Well, not might have been able to do. I will be able to establish I now can do it. I didn't have financing before. There is an existing law. I now come to the city council and I say I have financing and here is my financing. I have got the Bank of America in on this; they are copartners on this. I have the prospect of the following tenants. I have all the financing. I can afford it and I want to build it.

Now, you have a zoning law here that tells me I can't build it. So I go to court and I say they have deprived me of a third of the value of my property—in excess of a third of the value of my property.

Mr. SCHMIDT. Well, I guess the complicating factor there would be that if it was known from the beginning the city of Washington barred any building higher than the Capitol——

Senator BIDEN. Yes, it is known.

Mr. SCHMIDT [continuing]. Presumably that would have been reflected in the value of your property. So, today, property in Washington is not valued on the basis of your ability to build a 75-story building. I don't want to argue with the hypothetical, except I think it is complicated by that factor.

Senator FEINSTEIN. Senator, would you yield for a minute on this point?

Senator BIDEN. Sure.

Senator FEINSTEIN. Let me take the Senator's point and apply it in a slightly different situation, one that is true to life and took place during my lifetime. Let me take you to San Francisco. The zoning in the downtown area is unlimited. The board of supervisors

and the mayor change the zoning. This law is in place. We changed it from unlimited height to where only four blocks in the city—this is actual—can have a 600-foot height. I own property and suddenly the law is changed, and I could have gone to unlimited height and now I can only go to 600 feet. Do I have recourse under this law?

Mr. SCHMIDT. If this statute applied to the city of San Francisco—I don't want to be confusing it. This is a Federal statute, so by its current terms it wouldn't. But if it applied, that would mean everybody who held property in that area would be entitled to compensation, assuming they could show that the value of their land was reduced by a third or more, which presumably would clearly be the case in that kind of situation.

Senator FEINSTEIN. So that is the impact?

Mr. SCHMIDT. That is exactly the impact.

Senator FEINSTEIN. That is the strength of this law in terms of municipal governmental powers?

Mr. SCHMIDT. If this law applied to municipal governments, but again I don't want to be confusing it. This is a law that applies to everything the Federal Government does directly or indirectly. It wouldn't apply directly to the city of San Francisco.

Senator FEINSTEIN. Right; I understand.

The CHAIRMAN. Even there, there are a lot of variables. There are a lot of factors that could change that, and there might be a reason why that should constitute a taking. In other words, government just can't be arbitrary and do whatever it wants to to people's property.

Mr. SCHMIDT. Well, if we generally started saying that any changes in zoning laws that had an impact of more than a third on the value of property would be compensable, we frankly, I think, would bring to a halt the—

The CHAIRMAN. But that is not what this bill says, as you have pointed out. It only applies to the Federal Government.

Mr. SCHMIDT. Well, we were talking, I think, assuming it applied to the city, but the same impact applies to everything the Federal Government does.

Senator BIDEN. Let's talk about that. I thought this bill established a Federal right of action in Federal court, but it didn't require a Federal action.

Mr. SCHMIDT. No; it applies to action by the Federal Government or anything which is funded by the Federal Government.

The CHAIRMAN. That is right.

Mr. SCHMIDT. But it doesn't, by its terms, apply to—

The CHAIRMAN. States and localities.

Senator BIDEN. This is important because it is a big deal. It says on page 8, "private property" or "property" means all property protected under the fifth amendment to the Constitution of the United States, any applicable Federal or State law, or this Act, and includes (A) real property, whether vested or unvested, including (i) estates in fee * * * and then it goes down and says, "(B) the right to use water or the right to receive water, including any recorded lines of such water right; (C) rents, issues, and profits of land, including minerals, timber, fodder, crops * * * (D) property rights provided by, or memorialized in, a contract, except that such rights"—

Mr. SCHMIDT. But I think, Senator, if you go back, then, to section 204, which is the section which establishes the——

Senator BIDEN. What page is that? Can you help me out?

Mr. SCHMIDT. It is on 11 in what I have.

Senator BIDEN. OK.

Mr. SCHMIDT. It says, "No agency or State agency, shall take private property * * *" Then if you work it through, the definition of State agency is States and localities, but only, back in the definition on page 9, when they are carrying out or enforcing a Federal law or receiving Federal funds in connection with it.

Senator BIDEN. I see.

Mr. SCHMIDT. So it isn't applicable by its terms.

Senator BIDEN. I see. Well, that is interesting. So this doesn't apply at all, then, to any action taken by a State or local government that isn't required to take that action because of a Federal law?

Mr. SCHMIDT. Yes, or funded by the Federal Government. The reason a lot of the cities, however, are very concerned about it is they look at it and they say, look, if the Federal Government starts saying that it is going to be obligated to compensate anybody anytime it takes governmental action which has an impact of reducing property values by a third or more, the same doctrine is going to very quickly, apply to us in the city of San Francisco or the State of Delaware or anywhere else.

So to that extent, I think you have concerns at the city and State levels that go beyond the immediate impact of the statute. But the statute, by its terms, applies to the Federal Government and anything done at the State or local level which is funded by the Federal Government or directed by the Federal Government.

Senator BIDEN. So if the Federal Government, for example, funds sewers, which we do, and in my State, which is a case that could have happened—it didn't—in my State, the farmers in the lower part of New Castle County back when I was a county council person came to me and said, look, Joe, the Getty oil refinery wants to build a new refinery in the middle of our farmland here; they have purchased "x" number of pieces of property and they are going to build a new refinery.

I believe Dow Chemical was going to build a facility on the Chesapeake and Delaware Canal, all overwhelmingly a farm area. The farmers came and said, we don't think you should rezone the property to allow them to do that. It is presently zoned agricultural. Now, both of those facilities would have to have access to sewer and water, both of which would be funded by the Federal Government, in part, at least, although the zoning law is not a Federal law.

Are you saying to me, as the Justice Department reads this statute, that if that locality, in order to protect farmers, says Getty Oil cannot build their refinery—and there is a refinery there. I don't want to confuse everybody, but this was a new refinery they were talking about. If the new refinery is blocked from being built because the county council will not give the zoning to allow it to be built, does this statute come into play in any way?

Mr. SCHMIDT. Well, I think conceivably it could, but the definition of State agency for this purpose picks up an agency which re-

ceives Federal funds in connection with a regulatory program established by the State, and then it picks up action which is taken in connection with that regulatory program. So there would have to be a nexus between the Federal funds and the action that was taken which became the subject of the statute.

Senator BIDEN. So the action taken would be if the county council said we are not going to do this because it is going to increase the cost to the force main interceptor for the County Sewage System so much that we don't want to do that, and so we are not going to give the zoning to allow high industrial use for that piece of property because it is going to put too much of a strain on the Sewage System in the county?

Mr. SCHMIDT. Well, I think the part of it that we would have to look at would be whether the initial Federal funds that were involved in that program were, first of all, Federal funding in connection with a regulatory program. It sounds like they would be. Then the further test is that the receipt of Federal funds must be directly related to the taking of private property.

So the answer is there would be a test there of whether there was a sufficiently close relationship between the receipt of the Federal funds, which itself would be a litigable issue, I suppose, in a lot of cases.

Senator BIDEN. Well, let me ask you another question, then, because that clears up a lot for me. That makes this much less onerous than I thought it was if that is a correct reading.

Let me ask you another question. Let's assume that we change the law to say, for whatever reason—it is a bad policy and we come along and say you can no longer cut any timber in the Tongas; you just can't go into a national forest and contract with anybody for them to take timber out of that. Let's say the House and Senate decide that and whoever is President signs that into law. Does that create any cause of action for anybody under this bill?

Mr. SCHMIDT. If the Federal Government were to take that position, it would presumably be running counter to a range of current contractual rights, a wide range, and I would think it would have to pay massive compensation to everybody who currently has a right to go in and cut timber in the national forests. That is action by the Federal Government. When you said it is not as onerous as you thought, I guess it only applies to everything the Federal Government ever does, but it is a pretty broad—

Senator BIDEN. The overall point I wish to make is I think it is very onerous as it relates to Federal environmental laws and Federal laws designed to protect the public health and safety because it is going to get you into everything, from the FDA to God only knows what else. That is the next point I want to get to.

Let's assume that a certain drug company has a product which they believe that if, in fact, they were able to put the product on the market, their investment in it and their projected earnings from putting that product on the market would exceed a third of the value of that company, and the FDA comes along and says, no, no, we think you don't meet the requirements here; it is too safe or too unstable to put on the market; we don't approve it.

Does this create a cause of action? Notwithstanding what we are doing in regulatory reform, does this create a cause of action for

that drug company to come along and say, OK, you are telling us it affects the public health and safety—I don't know how they prove a tort or nuisance action at that point because they haven't put it on the market. How do you deal with that?

Mr. SCHMIDT. This bill does not have any exception for the FDA or for any other particular agency. This bill says whenever the Federal Government takes a regulatory action that has an impact that reduces the value of somebody's property or any portion of their property by a third or more, they have a claim to compensation. So I think in that case they have a claim.

Senator BIDEN. If, for example, the Federal Government decided, before we had polio vaccine, and said to Dr. Jonas Salk—they would have been wrong, but if they said, no, you can't put that vaccine on the market, and it hadn't been put on the market, so no one was negatively impacted, so there is no nuisance action, nor is there any ability to establish a tort action because no one has been injured, would a Federal court be required to say under an honest reading of this statute you have to compensate the Jonas Salk polio vaccine company for the investment that they have put into this so far—it is the only thing they do—and theoretically the lost profits that would flow from putting this on the market?

Mr. SCHMIDT. I think you would.

The CHAIRMAN. You are arguing that a drug company that has a drug before FDA that is in a premarket approval mode—if they reject that drug, they have a Takings Clause case? You have got to be kidding.

Mr. SCHMIDT. If there is a regulatory action——

The CHAIRMAN. You have got to be kidding.

Senator BIDEN. The regulatory action could be the FDA says you can't put it on the market.

Mr. SCHMIDT. Which results in a reduction in the value of their property by a third or more. This bill applies.

The CHAIRMAN. In an already approved drug, right?

Mr. SCHMIDT. I am sorry?

The CHAIRMAN. It would have to be an already approved drug, though.

Senator BIDEN. Why?

The CHAIRMAN. You are saying this bill would take the FDA's right away from them to approve drugs? Give me a break.

Mr. SCHMIDT. I don't think the denial of an approval, per se, is going to give rise to a cause of action.

The CHAIRMAN. Well, I will tell you it won't.

Mr. SCHMIDT. But if they take an action which has an impact in reducing the value of somebody's property by a third or more, this bill says you are entitled to compensation. There is nothing here that says that doesn't apply to FDA actions.

The CHAIRMAN. Well, I guess you can conjure up any extreme hypothetical, but that is certainly one that is going to be upheld by anybody, and you know it and I know it.

Mr. SCHMIDT. Well, you know, there have been takings cases where people tried to recover, for example, against States which imposed restrictions on the sale of certain types of alcoholic beverages.

The CHAIRMAN. I understand people bring innovative cases. I mean, that is what lawyers sometimes are all about, but that doesn't mean they win all those cases, and they are not going to win, under this bill, those kinds of cases. I mean, that is ridiculous.

Mr. SCHMIDT. Well, they would if you don't have an exception for actions that are taken——

The CHAIRMAN. Well, sure they would. The courts would establish the exception if you didn't have anything else, but I don't think anybody would even argue those things.

Senator BIDEN. Would the Senator be willing to write that explicitly into the legislation?

The CHAIRMAN. I would be happy to work on language. I mean, if there is something that we can do to make this more refined and better, I have already offered to do that. So we will work with you on it, but I could ask a million extreme things about any bill.

Mr. SCHMIDT. But the problem, I guess, Senator, is the language here is stated in the most stark and—I don't want to use scare words—but extreme terms. It says, regardless of anything else, if the Federal Government takes a regulatory action that reduces the value of somebody's property by a third or more, they are entitled to compensation. That is what the words say. Now, you can say, well, a court wouldn't reach those——

The CHAIRMAN. There is a rule of reason in law, and you know it and I know it, that isn't going to go beyond——

Senator BIDEN. But we have got to count on reasonable judges, and you and I both know, Senator——

The CHAIRMAN. Everytime we pass legislation, we have got to count on them, and in this case it is no exception. We are not going to be able to write a 3-million-page bill. I mean, let's be honest about it. I could give you all kinds of extreme examples in anything we do, but the point is what is the practical effect of the bill.

Senator BIDEN. The practical effect of the bill, as I read it, and that is why I asked the question, is that if someone had a product for approval before the FDA and that product's failure to go on to the market would affect the value of that company by more than a third, they could bring a cause of action saying they have been deprived.

The CHAIRMAN. And that cause of action would be thrown out of court so fast your head would be spinning.

Senator BIDEN. On what grounds would it be thrown out?

The CHAIRMAN. On the grounds that the FDA has the legislative authority to approve marketable drugs.

Senator BIDEN. How is that different than the EPA, or how is that different from——

Mr. SCHMIDT. If you are saying there would be a general exception for any action taken——

The CHAIRMAN. If they could show that the FDA was arbitrary and capricious and didn't abide by its own rules and regulations in rejecting the drug, sure. Why shouldn't they have a right of cause of action? You are darned right they should. That is what it comes down to. We could get into this forever.

Mr. SCHMIDT. If you are suggesting that this bill won't apply to any action taken by a regulatory authority that is done within

their existing statutory authority, that is a major change in what is here.

The CHAIRMAN. No; we are saying regulatory authorities have to be reasonable in their approach. They can't just arbitrarily do what they want to do just because they happen to be the almighty Federal Government. That is what we are trying to end.

Senator BIDEN. Well, Senator—

The CHAIRMAN. Now, let me make an offer. If the language is too stark, we will be happy to work with you on it, but I think everybody knows what we are trying to do here, and that is we are trying to get people just compensation for really wrongful takings of property by the Federal Government.

Senator BIDEN. I agree with that.

The CHAIRMAN. It is out of control right now.

Senator BIDEN. I agree with that.

The CHAIRMAN. I will work with the distinguished minority leader on this committee to try to resolve any conflicts that he feels are there, but I think these are extreme examples that any court in the land would knock down.

Senator BIDEN. Senator, it is not an extreme example if you take the literal language of the statute. You have got people coming up here who are going to testify on behalf of it. I am not looking for a fight. I just want to know whether a reasonable reading of that section of the statute would create a cause of action. That is all.

The CHAIRMAN. And I am saying—

Senator BIDEN. You are saying it does not. I am curious what the witness says. I know what you think, Senator. You think this is just fine. I want to find out from the witnesses. That is why we have these hearings, with all due respect.

The second question I have relates to what happens, in the Justice Department's view, if the FDA goes out and approves a product and later concludes that the product is causing harm and concludes that they wish the product to be taken off the market. If it affects the value of the company by more than a third, does it create a cause of action under this bill?

The CHAIRMAN. My only problem is when the Associate Attorney General of the United States comes in here and just completely ignores a rule of reason and ignores how the laws are applied, it bothers me a great deal. I have a lot of respect for Mr. Schmidt. He knows it, and I intend to work with him, but, by gosh, let's get reasonable here.

Senator BIDEN. Senator, let's put it another way, then. Let's get away from the FDA. Does the distinguished chairman disagree with the interpretation given by the Associate Attorney General to Senator Feinstein when she said would an assault weapons ban create a cause of action requiring compensation to any gun store owner, any manufacturer, or any individual who had as part of their totality of the guns that they owned—that this would diminish the value by a third? Does he disagree with the answer?

The CHAIRMAN. Sure, I do.

Senator BIDEN. You do?

The CHAIRMAN. Of course, I do. Of course, I do. Government still will have a right under this bill and under its laws to be able to ban things that they consider to be public nuisances. The govern-

ment can properly ban anything prospectively under the bill without paying compensation, but the government cannot go into that store and take those guns that are lawfully held without paying just compensation.

Senator BIDEN. That is correct.

The CHAIRMAN. The government has the right to ban weapons if it so chooses. I think it is inadvisable, personally.

Senator BIDEN. So for legislative interpretive purposes, you don't think the intent of the author of this bill is in any way to diminish the right of the Federal Government—if it concluded, as it did, that certain weapons should not be able to be manufactured, your reading of this bill is that the manufacturer of those weapons is not entitled to compensation?

The CHAIRMAN. Absolutely right, absolutely right, and if anybody interprets it beyond that, I think they are doing an extreme interpretation.

Senator BIDEN. That is interesting.

The CHAIRMAN. Now, Senator, let me make a suggestion. We have got six other witnesses here.

Senator BIDEN. But we have got the Justice Department here, Senator.

The CHAIRMAN. Fine, and the Justice Department has testified and we are going to keep the record open for questions in writing, and we may have future hearings, but I think we have got to get the——

Senator BIDEN. Senator, you and I hardly ever fight, and very seldom in public, but this is being unreasonable.

The CHAIRMAN. I don't want to fight over it, but I also don't want to be here until 3 o'clock.

Senator BIDEN. The Justice Department is testifying. No extraneous question has been asked yet, and you are about to cut it off and say maybe we will have additional hearings. That is outrageous, absolutely outrageous.

The CHAIRMAN. Well, then, I will be outrageous because we have done it on this committee from day one. There are limits to questions because we want to accommodate other people and we want to accommodate other Senators, and I have a markup to go to.

Senator BIDEN. How long was the Justice Department before this committee, 1 hour, 1½ hours?

The CHAIRMAN. Probably that long.

Senator BIDEN. And that is unreasonable, you are telling me?

The CHAIRMAN. I am not saying it is unreasonable. I am saying that it is reasonable to limit questions on the committee. You have taken enough time. I have given you my time.

Senator BIDEN. You have given me a total of about 25 minutes.

The CHAIRMAN. Senator, if we need to bring the Justice Department back, we will do so.

Senator BIDEN. I am telling you now, I have many more questions for the Justice Department.

The CHAIRMAN. Then put them in writing.

Senator BIDEN. I ask that they be brought back.

The CHAIRMAN. Then put them in writing, Senator, and we will go from there.

Senator BIDEN. This is a new ball game, pal.

The CHAIRMAN. No, it isn't a new ball game. Let me tell you, you ran the committee this way, too.

Senator BIDEN. And I never cut you off. I never shut down a hearing, never, and I never once, when you had the Reagan and/or the Bush Justice Department before you and you had questions of them, ever cut you off.

The CHAIRMAN. Senator, you can continue if you want to, but let me just say this. I am trying to accommodate six other witnesses. I am trying to accommodate your schedule and my schedule, and especially mine, and I am trying to——

Senator BIDEN. You are trying to ram through a bill without any due consideration.

The CHAIRMAN. Senator, ask any questions you want to. I will sit here forever and we will just defer everything. You just ask all the questions you want to and we will just let people wait.

Senator BIDEN. That is the usual practice of the committee.

The CHAIRMAN. Yes; listen, let's just do what you want to do. I will be happy to wait.

Senator BIDEN. Let me ask you about the contractual issue, if I may. Is this a new cause of action that is created under fifth amendment jurisprudence, this notion that the language in the statute—where is that language, if I may ask, on contracts? I had it here.

Mr. SCHMIDT. It is pages eight and nine, which have a definition of property generally that is expansive beyond current fifth amendment law. One of my colleagues pointed out to me with respect to water rights that it actually goes beyond even contractual rights. It refers to the——

Senator BIDEN. Explain in which way it goes beyond.

Mr. SCHMIDT. Well, it talks about, in paragraph (B) on page 9, "the right to use water or the right to receive water." It does not seem to be limited there to a contractual right, so even if it were not embodied in a contract, if there were some interference with a preexisting right to use water, that would represent a compensable taking under this statute.

Senator BIDEN. If the Federal Government built a dam in the West causing the riparian water rights below to be affected, is that compensable now under takings jurisprudence?

Mr. SCHMIDT. I believe the general answer to that would be no. You know, there might be some special circumstances and if someone here wants to correct me on that, I will stand corrected, but I think the general answer would be it would not be.

Senator BIDEN. The enforcement of environmental statutes is often cited as the best example of takings, and today this bill moves beyond land use statutes. How would the definition and compensation schemes contemplated under the bill affect the ability of the Department of Justice to enforce such statutes as the Americans With Disabilities Act—you have spoken to that—or the civil rights laws? How would it affect the enforcement of existing civil rights laws?

Mr. SCHMIDT. I think the Americans With Disabilities Act is probably the strongest example because that does have a direct effect upon people's property by saying that under certain circumstances they have to provide access of one sort or another. If

a requirement of that nature results in a reduction in the value of somebody's property of more than a third, then the Government would have to pay compensation. So either the Justice Department or whoever else is enforcing the law would decide we couldn't go forward, or if we went forward, there would have to be compensation.

I don't want to suggest, and I don't think I did, that, in general, the civil rights laws impose restraints which reduce the value of people's property. So I don't think in that general sense there is an impact on the civil rights laws, but there clearly is when it comes to the ADA, which requires people to change and modify their property.

Senator BIDEN. We either have heard when I was in the caucus or about to hear about the unfortunate and, in my view, unfair circumstances surrounding the condemnation of Ms. Edwards' property. What sort of Federal role would there be in a condemnation proceeding by the city of Provo?

Mr. SCHMIDT. None; her property, as I understood it, was condemned by the city of Provo and it was not a Federal condemnation.

Senator BIDEN. So would she have a cause of action under this legislation for what happened to her?

Mr. SCHMIDT. Well, as I understand it, her contention was that the designation of her property as a wetland, which preceded the city of Provo's condemnation, had an impact on the value of her property. I guess under this statute, if that had happened and if that value exceeded a third, then she conceivably would have had a cause of action under the statute.

Senator BIDEN. Apparently, after the condemnation of her property, Provo subsequently developed her property, and Ms. Edwards' understanding was that her property was classified as a wetland and could not be developed. Under what circumstance would the city be allowed to develop a property that a private citizen would be precluded from developing?

Mr. SCHMIDT. To my knowledge, there is none. Someone here who is an expert on wetlands may correct me, but I don't think that the circumstances are different. So, presumably, if the city was able to get permission to do it, conceivably she could have. But, you know, those would be facts and circumstances, and I really don't want to get in a position of arguing with someone who knows her own circumstances far better than certainly I do at this point.

Senator BIDEN. Now, the bill requires the Federal Government to conduct, "a private property taking impact analysis," before it issues "any policy, regulation, proposed legislation, or related agency action which is likely to result in the taking of private property."

The Supreme Court told us in its taking analysis, that "it is an essentially ad hoc inquiry." That was the *Penn Central* case that you cited earlier. Now, this bill would require Federal bureaucrats and Congressional staff to try to assess, in the abstract, the nationwide taking impact on each and every proposed regulation or piece of legislation that met the broad definition of a taking under the act, which is presently not the constitutional standard. What kind of impact will this have on our ability to pass laws before the fact?

The CHAIRMAN. That is an executive order, right, which is still law?

Mr. SCHMIDT. There is a executive order that relates to circumstances where there is an anticipated taking under the current constitutional standard.

Senator BIDEN. Right, not under this standard.

Mr. SCHMIDT. If you limit that requirement to takings which meet the constitutional standard, then I think that is something that, as you indicate, Senator, the executive branch is not necessarily opposed to. The problem is when you apply that to an expansive definition of taking which applies to any governmental action which can have, I guess it would mean, any impact on anybody which reduces the value of their property or any portion of their property by a third or more. I think you are effectively saying that they would have to do an analysis of that kind with respect to virtually every conceivable action, so it is the breadth of the taking definition that comes back into that analysis requirement and becomes a kind of bureaucratic—

Senator BIDEN. I don't have any more questions. Thank you.

The CHAIRMAN. Well, thank you.

Mr. Schmidt, we appreciate your taking time to be with us today.

Mr. SCHMIDT. Thank you, Senator.

The CHAIRMAN. I am sincere about working with you.

Mr. SCHMIDT. Thank you.

The CHAIRMAN. I want to have the benefit of your advice and your expertise, and we will keep the record open so anybody can ask written questions and clarify any or all of these matters from a written questions standpoint.

Thank you for taking time. We respect you and we appreciate your doing it.

Mr. SCHMIDT. Thank you.

[The prepared statement of Mr. Schmidt follows:]

PREPARED STATEMENT OF JOHN R. SCHMIDT

I. INTRODUCTION

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE: Thank you for the opportunity to provide the Administration's views regarding S. 605, the "Omnibus Property Rights Act of 1995," and similar bills that seek to expand the traditional concept of "takings."

It is sometimes worthwhile to state the obvious just to ensure that no one is laboring under any misconceptions. This Administration strongly supports the protection of private property rights. The right to own, use, and enjoy private property is at the very core of our nation's heritage and our continued economic strength. These rights must be protected from interference by both private individuals and governments. That is why the Constitution ensures that if the government takes someone's property, the government will pay "just compensation" for it. That is what the Constitution says. That is what the President demands of his government.

To the extent government regulation imposes unreasonable restrictions or unnecessary burdens on the use of private property, this Administration is committed to reforming those regulations to make them more fair and flexible. We have already implemented a number of significant regulatory reforms to alleviate burdens on property owners, and we are developing additional ways to improve federal programs to provide greater benefits to the public while reducing regulatory burdens, particularly for small landowners. I will describe some of these reforms in greater detail later in this testimony.

Mr. Chairman, no one could disagree with the concerns that underlie S. 605. All citizens should be protected from unreasonable regulatory restrictions on their property. But S. 605, and H.R. 925 passed by the House of Representatives, will do little

or nothing to protect property owners or to ensure a fairer and more effective regulatory system. Rather, we are convinced that these proposals to require compensation in contexts very different from the balance struck under the Constitution itself are a direct threat to the vast majority of American citizens.

The truth is that this bill and similar proposals are based on a radical premise that has never been a part of our law or tradition: that a private property owner has the absolute right to the greatest possible profit from that property, regardless of the consequences of the proposed use on other individuals or the public generally.

As a result, passage of these arbitrary and radically new compensation schemes into law will force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, public safety, the environment, civil rights, worker safety, and other values that give us the high quality of life Americans have come to expect. The cost of these protections and programs after passage of the proposed compensation legislation would be vastly increased. Ironically, if we chose this path, the value of the very property this legislation seeks to protect would erode as vital protections are diminished. The other option would be to do what these proposals require: pay employers not to discriminate, pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through their property and our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws. That is, each American would be forced to pay property owners to follow the law. In the process, we would end any hope of ever balancing the budget.

No matter which of these two avenues we pursue, hardworking American taxpayers will be the losers. Either they will no longer be able to enjoy the clean skies, fresh water, and safe workplaces they have come to expect, or they will be forced to watch as their tax dollars are paid out to corporations and other large property owners as compensation.

The Administration will not and cannot support legislation that will hurt homeowners or cost American taxpayers billions of dollars. The Administration, therefore, strongly opposes S. 605 and similar bills. The Attorney General would recommend that the President veto S. 605 or similar legislation.

II. THE COMPENSATION SCHEMES IN TITLES II AND V WOULD HARM THE OVERWHELMING MAJORITY OF PROPERTY OWNERS, COST AMERICAN TAXPAYERS BILLIONS OF DOLLARS, CREATE HUGE NEW BUREAUCRACIES AND A LITIGATION EXPLOSION AND UNDERMINE VITAL PROTECTIONS

A. *The fifth amendment to the U.S. Constitution*

As you know, the Fifth Amendment to the Constitution of the United States provides that "private property [shall not] be taken for public use, without just compensation." That short phrase has provided the compensation standards for takings cases since the founding of our country. Within its contours lies a balance between the authority of the government to act in the public interest and its obligation to provide compensation when those actions place an unfair burden on an individual's property. Before we consider proposals to alter and expand those standards, it is worth discussing what the Constitution provides and why we believe it has served the American people so well over the last 200 years.

The genius of the Constitution's Just Compensation Clause is its flexibility. In deciding whether a regulation is a compensable taking, the Constitution requires the government, and if necessary the courts, to consider the nature of the property interest at issue; the regulation's economic impact; its nature and purpose, including the public interest protected by the regulation; the property owner's legitimate expectations; and any other relevant factors. The ultimate standards for compensation under the Constitution are fairness and justice. Thus, we have never recognized an absolute property right to maximize profits at the expense of the property or other rights of others. For example, reasonable zoning by local governments has long been accepted as a legitimate means to promote safe and decent communities without requiring the payment of compensation to those whose property values might be adversely affected. Indeed, we recognize that the value of property in the community as a whole is thereby enhanced. On the other hand, when government regulation "goes too far" (in the words of Justice Holmes) and imposes a burden so unfair on an individual property owner that it constitutes a taking, compensation must be paid.

This constitutional tradition has been carefully developed by the courts through hundreds of cases over the course of our nation's history. As I mentioned, its genius is its flexibility, for it allows the courts to address the many different situations in which regulations might affect property. It allows for the fair and just balancing of

the property owner's reasonable expectations and property rights with the public benefits of protective laws, including the benefit to the property owner.

It goes without saying that the economic impact of a regulation is an important consideration in deciding whether it would be fair and just to compensate a property owner. But in the very case that established the concept of a regulatory taking—*Pennsylvania Coal Co. v. Mahon* (1922)—the Supreme Court was careful to emphasize that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” From the earliest days of our Republic, we have recognized that the government has a legitimate, and indeed a critical, role to play in protecting all of us from the improper exploitation of property. In America, we have an opportunity to use our property freely—within the bounds we set through our communities and elected representatives. We have also recognized that our rights as citizens entail a corresponding responsibility to refrain from exercising those rights in ways that harm others.

As we consider our constitutional tradition and the potential effects of S. 605, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards its constitutional obligation to pay just compensation when it takes private property. This is simply incorrect. The Justice Department's regulatory takings docket is actually relatively small. To cite but one example, of the 48,000 landowners who applied for a permit under section 404 of the Clean Water Act in 1994, only 358, or 0.7 percent, were denied a permit. Another 50,000 land-use activities are authorized annually through general permits under the 404 program. And we now have only about 30 takings claims involving the 404 permit program. These figures result from our commitment to ensuring that government programs are implemented in a way that respects property rights.

B. The compensation schemes in S. 605

A Radical Departure from Constitutional Tradition. The compensation schemes in S. 605 disregard our civic responsibilities and our constitutional tradition. They replace the constitutional standards of fairness and justice with a rigid, “one-size-fits-all” approach that focuses on the extent to which regulations affect property value, without regard to fairness, to the harm that a proposed land use would cause others, to the landowner's legitimate expectations, or to the public interest. They ignore the wisdom of the Supreme Court, and they would wipe out many vital protections and generate unjust windfalls.

S. 605 would require the federal government to pay a property owner when federal agency action reduces the value of the affected portion of the property by 33 percent or more. The compensation requirement also applies to a wide range of state and local actions under federally funded, delegated, or required programs. The single exception to the compensation requirement is in the relatively rare instance in which the agency action does nothing more than restrict property use that is already prohibited by applicable state nuisance law.

It is important to recognize just how radical S. 605 and similar bills are. In 1993, every Member of the U.S. Supreme Court—including all eight Justices appointed by Republican Presidents—joined an opinion stating that diminution in value by itself is insufficient to demonstrate a taking. See *Concrete Pipe & Products of California Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2291 (1993). They not only acknowledged the correctness of this principle, but they characterized it as “long established” in the case law, a principle developed and accepted by jurists and scholars throughout our Nation's history. This constitutional principle does not result from insensitivity to property rights by the Founders or the courts, but instead from a recognition that other factors—such as the landowner's legitimate expectations, the landowner's benefit from government action, and the effect of the proposed land use on neighboring landowners and the public—must be considered in deciding whether compensation would be fair and just. Because S. 605 precludes consideration of these factors, its single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.

The compensation standard in S. 605 is also flawed because the loss-in-value trigger focuses solely on the affected portion of the property. The courts have made clear that fairness and justice require an examination of the regulation's impact on the parcel as a whole. *E.g., Concrete Pipe*, 113 S. Ct. at 2290; *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978). By establishing the affected portion of the property as the touchstone, the bill ignores several crucial factors essential to determining the overall fairness of the regulation, such as whether the regulation returns an overriding benefit to other portions of the same parcel. Moreover, under S. 605 a landowner could segment the parcel or otherwise manipulate the

loss-in-value calculation in a manner that demonstrates a very high (if not total) loss in value in almost every case. For example, if a developer is allowed to develop 99 acres of a 100 acre parcel, but required to leave one acre undeveloped to protect a bald eagle's nest, the developer could seek compensation for that restriction on a single acre. Or suppose the civil rights laws require a restaurant to make its restrooms accessible to wheelchair users. Under S. 605, the restaurant owner would not need to show a 33 percent loss in value of the entire restaurant, but only of the affected portion of the restaurant. In other words, it could argue that the space needed for this accommodation is no longer available for tables, and that because this small affected portion has been reduced in value, automatic compensation is required under the bill.

Sections 204(a)(2) (A) through (C) would freeze into law several additional compensation standards that appear to be loosely based on various Supreme Court cases. In our view, these standards in the bill reflect unjustifiably broad readings of the applicable case law.

The overall breadth of the bill's compensation requirement is staggering. It includes extremely broad definitions of "property," "just compensation," "agency action," and other key terms, some of which conflict with their accepted meaning as used in the Constitution. It applies without regard to the nature of the activity the agency seeks to prohibit. In many cases, large corporations would be free to use their property in whatever manner they desire, however reckless, without regard to the impact their activities have on their neighbors and the community at large.

Think of the consequences of this requirement for just the federal permit programs. A landowner would be able to claim compensation whenever an application for a federal permit is denied. For example, a landowner could apply for a federal permit to build a waste incinerator. If that permit is denied for whatever reason and the denial decreases the value of the property, the government could be obligated to pay the permit applicant. It is not much of a stretch to conclude that applying for federal permits may become a favored form of low-risk land speculation. The more likely a permit is to be denied, the more attractive it may be under these schemes.

Because S. 605 goes beyond mere land-use restrictions and applies to all manner of agency actions, it is likely to have many unintended consequences that we cannot even begin to anticipate. The bill's various and confusing terms and conditions make it difficult to predict how the courts would apply it, but we can rest assured that plaintiffs' lawyers will seek the broadest possible application: compensation for businesses that must comply with access requirements under the Americans with Disabilities Act; compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver; compensation for corporations across the country where the Congress adjusts federal legislation designed to stabilize and protect pension plans; compensation for virtually any federal action that might affect the complex water rights controversies in the West; compensation for agricultural interests that must comply with changing phytosanitary restrictions; compensation where food safety rules or product labeling requirements diminish the value of factories producing unsafe products; and so forth. The examples are virtually endless.

A Threat to Property Rights. Although these bills purport to protect property rights, they would undermine the protection of the vast majority of property owners: middle-class American homeowners. For most Americans, property ownership means home ownership. "Property rights" means the peaceful enjoyment of their own backyards, knowing that their land, air, and drinking water are safe and clean. The value of a home depends in large measure on the health of the surrounding community, which in turn depends directly on laws that protect our land, air, drinking water, and other benefits essential to our quality of life.

In fact, in a recent survey by a financial magazine, clean water and air ranked second and third in importance out of 43 factors people rely on in choosing a place to live—ahead of schools, low taxes, and health care. By undercutting environmental and other protections, these automatic compensation bills would threaten this basic right and the desires of middle-class homeowners. In the process, the value of the most important property held by the majority of middle-income Americans—their homes—would inevitably erode.

An Untenable Fiscal Impact. Because these bills are so broad and inflexible, and because they mandate compensation where none is warranted, the potential budgetary impacts are almost unlimited. Even if new regulatory protections were scaled back, these bills would still have a huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential government action. The Administration agrees with the assessment made earlier this year by Senator Richard L. Russman, a Republican State Senator from New Hampshire, who testified before

the House Judiciary Subcommittee on the Constitution on behalf of the National Conference of State Legislatures. He stated:

As a fiscal conservative and believer in limited government, compensation-type "takings" bills represent expensive "budget-busters." Their purpose is to give taxpayer subsidies to those who have to comply with requirements designed to protect *all* property values, and the health and safety of average Americans.

Because the compensation scheme in S. 605 is so broad in scope, it is extremely difficult to provide even a rough estimate of its overall potential fiscal impact. I am told that one proponent of these bills testified, with respect to the Americans with Disabilities Act alone, that potential liability would make administration of the Act prohibitively expensive. A 1992 study by the Congressional Budget Office estimated that application of one takings proposal to just "high value" wetlands—a proposal that also would have radically revised existing compensation obligations—would cost taxpayers \$10–15 billion. S. 605 would, of course, apply to far more programs and agency actions than just these two examples. Because S. 605 goes beyond mere land-use restrictions and applies to all kinds of agency actions, it is likely to have many unintended consequences and untoward fiscal impacts that we cannot even begin to anticipate.

Proponents of these bills sometimes argue that these costs are already being absorbed by the individual landowners. However, the potential costs of the bill are so high not because landowners are unreasonably shouldering these costs now, but because the bill would require compensation in many cases where compensation would be unfair and unjust—for example, where the landowner had no reasonable expectation to use the land in the manner proposed, or where other uses would yield a reasonable return on investment without harming neighboring landowners or the public.

S. 605 also requires the federal government to pay compensation for many State and local actions even where State and local officials would have the discretion to pursue another course of conduct. Imposing federal liability for actions by State and local officials would remove the financial incentive to ensure that State and local action minimizes impacts on private property, and would thereby further expand potential federal expenditures under the bill.

In addition to the compensation costs, S. 605 would exact a tremendous economic toll by preventing the implementation of needed protections. For example, fish and shellfish populations that depend on wetlands support commercial fish harvests worth billions of dollars annually. If compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses. Ironically, this bill might require the federal government to compensate the fishery and related economic interests whose profits are reduced by the government's failure to protect wetland habitats. There is seemingly no end to the chain of compensation claims created by the bill.

At the end of the day, no one can really say how much S. 605 would cost American taxpayers, except to say that those costs would be in the billions of dollars. The answer given by some proponents of these bills is that the costs will depend on how regulators respond. But suppose that every regulator responds by doing everything possible to reduce impact on private property. The compensation costs for carrying out existing statutory mandates and providing needed protections would still be overwhelming. I urge every fiscally responsible Member of this Committee to insist on a realistic cost analysis of this bill before the Committee votes on its merits.

Huge New Bureaucracies and Countless Lawsuits. S. 605 would also require the creation of huge and costly bureaucracies to address compensation requests. Title II would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Title V would establish an administrative compensation scheme with binding arbitration at the option of the property owner.

Agencies would need to hire more employees to process compensation claims, more lawyers to handle claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less.

A Threat to Vital Protections. As I mentioned earlier, the passage of any of these compensation bills would pose a serious threat to human health, public safety, civil rights, worker safety, the environment, and other protections that allow Americans to enjoy the high standard of living we have come to expect and demand. If S. 605 were to become law, these vital protections—which Congress itself has established—would simply become too costly to pursue.

S. 605 evidently attempts to address this concern in a small way by providing an exception to the compensation requirement in Title II where the property use at issue would constitute a nuisance under applicable state law.

This narrow nuisance-law exception would not adequately allow for effective protection of human health, public safety, and other vital interests that benefit every American citizen. For example, the nuisance exception would not cover many protections designed to address *long-term* health and safety risks. The discharge of pollution into our Nation's air, land, and waterways often poses long-term health risks that would not be covered by the exception. Nor does the nuisance exception address *cumulative* threats. Very often, the action of a single person by itself does not significantly harm the neighborhood, but if several people take similar actions, the combined effect can devastate a community. Pesticide use, wetlands destruction, discharges of toxic pollutants to air and water, improper mining, or other property use by an individual property owner might not constitute a nuisance by itself. However, in conjunction with similar use by other property owners, they can seriously affect the health or safety of a neighborhood or an entire region. In some states, special interest groups have lobbied state legislatures for exceptions to the nuisance laws that allow huge commercial enterprises to operate noxious facilities in family-farm communities and residential neighborhoods.

Furthermore, there are certain critical public-safety issues that are governed exclusively by federal law, such as nuclear power plant regulation. As a result, public safety in these matters could be held hostage to the government's ability to pay huge compensation claims. Nor does the nuisance exception address uniquely federal concerns, such as national defense and foreign relations. Had S. 605 been in effect during the Iranian hostage crisis, federal seizure or freezing of Iranian assets could have resulted in numerous statutory compensation claims.

The nuisance exception also fails to recognize that there are many important public interests that are not related to health and safety and not addressed by state nuisance law. As I have already discussed, these bills threaten civil rights protection, worker safety rules, and many other vital protections.

"Horror Stories". Much of the debate about these issues has been fueled by what appear to be horror stories of good, hardworking Americans finding themselves in some sort of regulatory nightmare where the government is forbidding them from using their property in the way that they want. It is important to look closely at these stories, for they often are not as they first appear. They sometimes contain a kernel of truth, but you should realize that you're not always getting all of the facts.

I am not suggesting that there are no genuine instances of overregulation. We all know of cases of regulatory insensitivity and abuse that are quite simply indefensible. As I will discuss later, this Administration has made great strides in reducing unreasonable and unfair burdens on middle-class landowners, and we are committed to continuing the effort to reinvent government until the job is done.

Before I address those efforts, however, I want to draw the attention of the distinguished Members to another set of horror stories: those that may result if these compensation bills become law. I am confident that these are not the consequences any of us want:

- Suppose a coal company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. If the State refused to take action, and the Interior Department required the mining company to reduce the amount of coal it was mining to protect property and public safety, the mining company might well be entitled to compensation for business losses under this bill.
- Suppose a restaurant franchisee challenges the Americans with Disabilities Act provisions governing access for disabled individuals in public accommodations. If the franchisee could show that the requirements of the ADA somehow reduced his profits (perhaps by requiring a ramp that reduces the number of tables allowed in the restaurant) and thus diminished the value of the affected property, he could be entitled to compensation.
- Suppose the federal government restricts the importation of assault rifles. If an import permittee could show that the ban reduced the value of his overseas inventory, he could seek compensation under the bill.
- Suppose a group of landowners challenge the federal government's implementation of the National Flood Insurance Program, which imposes certain land use restrictions designed to decrease the risk of flooding. They could argue that such restrictions diminish the value of their land and obtain compensation.

- Suppose the Army Corps of Engineers denies a developer a fill permit under section 404 of the Clean Water Act because such development by the applicant and other nearby landowners would increase the risk of flooding of neighboring homes. Unless the Corps could bear the difficult burden of showing that the development would constitute a nuisance under applicable state law, compensation could be required.
- Suppose the Coast Guard establishes a phase-out schedule of single hull tankers; or suppose the Federal Aviation Administration orders airlines to suspend use of certain commercial aircraft that raise serious safety concerns; or suppose the Federal Highway Administration issues out-of-service orders to motor carriers directing them to cease using vehicles or drivers that pose an imminent hazard to safety. The bill raises the possibility that the taxpayers would have to compensate affected corporations for economic losses where they have been directed by the government to cease operating unsafe equipment to protect the public.

These are just a few examples of the problems the "one-size-fits-all" approach of these compensation proposals raises. It is worth noting that most of these examples reflect actual situations in which property owners challenged government conduct as constituting "takings" entitling them to compensation. In each case, the court, often after noting the public benefit derived from the government action, concluded that there had been no taking of property. If S. 605 becomes law, a different outcome in those cases may well be the result. Other examples of potentially compensable agencies actions under the bill can be found in an article published earlier this week in a national newspaper, which reported that a Nevada rancher is claiming that the government has "taken" his property by failing to prevent wildlife from drinking water and eating grass on public lands where the rancher has a grazing permit, and that California agribusiness operations who receive water from a federal irrigation project are hoping that bills like S. 605 will allow them to obtain compensation for reductions in federal water subsidies.

Opposition to Compensation Bills. It is because of these far-reaching and ill-conceived consequences that the Administration is in good company in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have opposed compensation bills of this kind. Religious groups, consumer groups, civil rights groups, labor groups, hunting and fishing organizations, local planning groups, environmental organizations, and others are on record as opposing compensation legislation. More than 30 State Attorneys General recently wrote the Congress to oppose takings legislation that goes beyond what the Constitution requires. On the other hand, the corporate trade associations and many other organizations that support compensation bills like S. 605 do not purport to represent the interests of most Americans.

Activity in the States is particularly instructive. More than 34 state legislatures have considered and declined to adopt takings bills. The New Hampshire and Arkansas legislatures rejected takings bills in the last few weeks. Just a few months ago, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill subject to many of the same criticisms as the compensation bills before the Congress. States are concerned that compensation bills would cost taxpayers dearly and eviscerate local zoning ordinances, and that family neighborhoods would be invaded by pornography shops, smoke-stack industries, feedlots, and other commercial enterprises. The Administration shares these States' concerns that compensation schemes would bust the budget, create unjust windfalls, and curtail vital protections. Indeed, some of the federal compensation bills, including S. 605, would subject various State and local actions to the compensation requirement, raising significant implications for state-federal working relationships.

Conclusion. The Administration supports and values the private property rights of all property owners as provided for in the Constitution. We must find ways, however, to ensure that individual property rights are protected in a manner that does not threaten the property rights of others, does not create more red tape, more litigation, a heavier tax burden on most Americans, and does not undercut the protection of human health, public safety, the environment, civil rights, worker safety, and other values important to the American people. S. 605 and other automatic compensation bills fail in each of these respects. As a result, the Attorney General would recommend to the President that he veto any such proposal that reaches his desk.

III. A BETTER APPROACH TO PROTECTING PROPERTY RIGHTS

The broad-based compensation packages currently pending in Congress are not the answer to the horror stories that I know all of you have heard and may well hear from other panelists today. Rather, we believe the answer lies in crafting specific solutions to specific problems. If federal programs are treating some individuals unfairly, we should fix those programs.

As part of our efforts to reinvent government, the Administration has reformed specific federal programs to reduce burdens on small landowners and others. Many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives announced on March 6, 1995, will give small landowners even greater flexibility. First, landowners will be allowed to affect up to one half acre of wetlands to construct a single-family home and attendant features such as a garage or driveway. The second initiative clarifies the flexibility available to persons seeking to construct or expand homes, farm buildings, and small business facilities where the impacts are up to two acres. Third, the Administration proposed new guidance that will expedite the process used to approve wet land mitigation banking, which will allow more development projects to go forward more quickly. In addition, the Army Corps of Engineers is reforming its wetlands program to make the permit application process cheaper and faster. These reforms will substantially reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt has already implemented several changes to the endangered species program to benefit landowners. For the first time ever, the Interior Department has proposed significant exemptions for small landowners. Under this new policy, activities that affect five acres or less and activities on land occupied by a single household and being used for residential purposes would be presumed to have only a negligible adverse effect on threatened species. Thus, under most circumstances, these tracts would be exempted from regulation under the Endangered Species Act for threatened species. The Interior Department has also announced an increased role for the States in ESA implementation, and new proposals to strengthen the use of sound and objective science. Under a new "No Surprises" policy, property owners who agree to help protect endangered species on their property are assured their obligations will not change even if the needs of the species change over time. And under a comprehensive plan for the protection of the Northern Spotted Owl, the Fish and Wildlife Service proposed a regulation that would generally exempt landowners in Washington and California owning less than 80 acres of forest land from certain regulations under the ESA associated with the Northern Spotted owl.

Proponents of statutory compensation schemes have argued that they are necessary because it is difficult and time-consuming to litigate a constitutional takings claim in federal court. We note that a property owner who successfully litigates a takings claim is already entitled to recover attorneys fees, litigation costs, and interest from the date of the taking, a powerful aid to vindicating meritorious claims. The Justice Department is also committed to working with the courts on approaches to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques. Again, we believe that solutions that focus on the specific issues of concern are preferable to a rigid, one-size-fits-all compensation scheme.

IV. THE PROVISIONS GRANTING THE COURT OF FEDERAL CLAIMS EQUITABLE POWERS AND REPEALING 28 U.S.C. 1500 ARE UNNECESSARY AND UNWISE

We are greatly troubled by the provisions in S. 605 that essentially discard the important distinctions between the Court of Federal Claims, an Article I court created by statute, and the district courts, Article III courts whose judges are life-tenured. For example, section 205 of the proposal would expand the jurisdiction of the Court of Federal Claims by giving it the authority to invalidate acts of Congress that adversely affect private property rights, the authority to decide all claims against the United States for monetary relief including those concerning the proper interpretation of statutes and regulations that are currently determined by district courts, the authority to grant injunctive and declaratory relief when appropriate in any case within its jurisdiction, and the authority to consider related claims brought under the Federal Torts Claims Act (FTCA). At the same time, the proposal would expand the jurisdiction of the district courts by giving those courts concurrent jurisdiction with the Court of Federal Claims over claims for monetary relief under the legislation. The proposal makes clear that "the plaintiff shall have the election of the court in which to file a claim for relief."

We should always be careful when we manipulate the jurisdiction of our courts, particularly when the jurisdiction of statutory courts such as the Court of Federal Claims are enhanced to the detriment of Article III courts. It is difficult to predict what the many consequences of such actions will be. However, we do know that these changes will give an Article I court the power for the first time to invalidate the actions of Congress. The power of invalidation is so great and raises such fundamental questions about the structure of the federal government that it has been traditionally reserved for Article III courts.

We also know that these changes would significantly blur the distinctions between the Court of Federal Claims and the district courts and, as a result, ignore the historical purpose and functions of the Court of Federal Claims. That Court was established by Congress pursuant to Article I of the Constitution to eliminate the need for Congress itself to consider private bills for monetary relief. Its function has been to provide a centralized forum—with expertise in specialized issues arising under federal law—to grant adequate relief at law for certain types of claims against the United States. As a result, the Court of Federal Claims has the authority to grant injunctive and declaratory relief in only very narrow circumstances. The proposed expansion of that Court's powers to grant such relief and to consider questions of state law pursuant to ancillary FTCA claims would fundamentally change the nature of that Court and its relationship to the district courts.

We are also opposed to the repeal of 28 U.S.C. § 1500, which bars the Court of Federal Claims from hearing any claim as to which the plaintiff already has a claim pending in another court. First, there is no need to repeal that section. According to the bill, repeal is necessary as current law "forces a property owner to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims." That is no longer the law. *Loveladies Harbor v. United States*, 27 F.3d 1545 (Fed. Cir. 1994). Second, the repeal of § 1500 would create opportunities for savvy litigators to manipulate the courts in bringing not just takings claims but all claims over which the Court of Federal Claims has jurisdiction. For example, if § 1500 were repealed, a plaintiff would be able to begin litigating aspects of a contract claim in district court and subsequently initiate a suit before the Court of Federal Claims in an effort to find the most sympathetic forum and to stretch the government's litigation resources. While the government presumably would have the right to transfer the cases and consolidate them in one forum, the government might not learn until well into the litigation that a complaint filed in the district court involved the same dispute as a complaint filed in the Court of Federal Claims due to the minimal requirements of notice pleading. The government's ability to identify related actions would be further limited by the sheer volume of civil litigation involving the United States.

V. THE TAKING IMPACT ANALYSIS REQUIREMENT IN TITLE IV WOULD CREATE MASSIVE AND COSTLY BUREAUCRATIC RED TAPE AT THE EXPENSE OF IMPORTANT PROTECTIONS

Section 403(a)(1)(B) of the bill would require all agencies to complete a private property taking impact analysis (TIA) before issuing "any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." The Administration firmly believes that government officials should evaluate the potential consequences of proposed actions on private property. Indeed, we consulted with the Senate last year on a similar requirement during its work on the Safe Drinking Water Act, and we hope to continue to work with Members who are interested in this issue.

Because S. 605 establishes such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of government operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. At a time when the Administration is reinventing government to make it more streamlined and efficient, Title IV would result in paralysis by analysis and generate a vast amount of unnecessary red tape.

The specific requirements of section 404 are also disturbing. Among other things, it would require agencies to reduce actions that are compensable under the Act to "the maximum extent possible within existing statutory requirements." By elevating property impact above all other legitimate goals and objectives, section 404 would inevitably lead to less effective implementation of any federal protections that affect property rights.

The bill's enforcement mechanisms are unclear, but section 406 of the bill suggests that actions could be filed in federal courts to enforce the TIA requirement.

Opponents of any government action would use legal challenges under the bill to delay or defeat the action by challenging whether an analysis must be done, whether every person with an interest received notice, and whether the analysis is adequate. Such litigation would result in an enormous additional burden on the courts' already overburdened docket.

VI. CONCLUSION

The Administration strongly supports private property rights. S. 605, however, represents a radical departure from our constitutional traditions and our civic responsibilities. It would impose an enormous fiscal burden on the American taxpayer, generate unjust windfalls for large landowners, create huge and unnecessary bureaucracies and countless lawsuits, and undermine the protection of human health, public safety, the environment, worker safety, civil rights, and other vital interests important to the American people. As a result, it would hurt the overwhelming majority of American property owners, middle-class homeowners, by eroding the value of their homes and land.

The Administration would like to work with the Congress to find ways to further reduce the burden of regulatory programs on American property owners. S. 605, however, is a ham-fisted, scattershot approach that would impair the government's ability to carry out essential functions and would impose a tremendous cost on the pocketbooks of middle-class Americans. Accordingly, the Attorney General will recommend a veto if S. 605 or any similar automatic compensation scheme or compensation entitlement program were to pass.

The CHAIRMAN. Our next witnesses will be Judge Loren Smith, the chief judge of the Federal Claims Court, who will discuss the technical jurisdictional issues which the bill resolves. The witness after Judge Smith will be Nancie Marzulla, who is president of Defenders of Property Rights. She has worked closely with us in merging the smaller bills into the omnibus bill. She is also an attorney and is familiar with the bill and I think could add a lot to this. I have a lot of respect for Nancie Marzulla.

I was going to have Roger come to the table, too, if we can make room for Roger, because Roger is a noted expert in this area and if he wants to make some comments, we will be happy to listen to him while he is here.

Our final witness on this panel will be Ray Ludwiszewski, who is the former general counsel of the Environmental Protection Agency during the Bush administration. Mr. Ludwiszewski is currently with the firm of Gibson, Dunn and Crutcher, and is very familiar with both the field of takings law and the bill itself. So we will be interested in what Mr. Ludwiszewski has to say as well.

So let's turn to you, Judge Smith, and we will look at the jurisdictional matters.

PANEL CONSISTING OF LOREN A. SMITH, CHIEF JUDGE, U.S. COURT OF FEDERAL CLAIMS, WASHINGTON, DC; NANCIE G. MARZULLA, PRESIDENT AND CHIEF LEGAL COUNSEL, DEFENDERS OF PROPERTY RIGHTS, WASHINGTON, DC, ACCOMPANIED BY ROGER MARZULLA; AND RAYMOND B. LUDWISZEWSKI, FORMER GENERAL COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, DC

STATEMENT OF JUDGE LOREN A. SMITH

Judge SMITH. Thank you, Mr. Chairman. It only a little change in the name of my friend, John Schmidt. So we had Schmidt and now we have moved to Smith. It is very good to be here, and I thank the committee for the opportunity to testify on section 205 of the bill dealing with jurisdiction.

Senator BIDEN. Good to see you, judge. When are you coming home?

Judge SMITH. Well, I wanted to say, Senator, that one of the things—I really am happy to be here. Senator Biden was my Senator. I miss Delaware. As I think George Washington said, it is a gem of a State, the Diamond State. I also greatly appreciated, when I was confirmed 10 years ago, that you were the first Senator who sent me a note congratulating me and giving me your support, and that has meant a lot to me, Senator.

Senator BIDEN. Things have gone downhill for your old law school since then. You are no longer teaching there and I am, and they sorely miss you and need you.

Judge SMITH. That is a good asset for the school. I know, also, a mutual friend of ours, Bill Quillan, is now teaching there. He is one of the great scholars and judges whom I know. So it is good to be here, and I also want to thank Senator Grassley for the great support he and Senator Heflin have given the court in our jurisdictional changes.

I will summarize my statement, if that is all right, rather than read the statement into the record.

In coming here this morning, I looked at the stone wall that is in front of the Court of Federal Claims and Court of Appeals, and on it is carved Abraham Lincoln's admonition that it is as much the duty of the government to render prompt justice against itself as it is to render justice among its citizens.

The bill—and, again, I think it would be inappropriate for me as a judge to comment on the substantive bill. That is a matter that the political branches, our President and our Congress, should decide, and therefore the judiciary really has its constitutional mission of taking the acts of Congress and interpreting them and applying them to specific facts. So I will just focus on the provisions of section 205 that I believe will make litigation at the Court of Federal Claims and at the U.S. district courts more efficient and more effective in the area of taking litigation and other litigation. There are four specific areas that I will briefly comment on and then, of course, be open to any questions the committee may have.

The provision for concurrent jurisdiction between the U.S. Court of Federal Claims and the U.S. district courts in all taking matters would avoid the problem that now is seen as a central problem by taking litigants, and I think it is also a problem to the U.S. Government in that it raises the cost of litigation and raises the uncertainty in this area of law, of the litigant first having to litigate the claim to whether they can use the property in a U.S. district court under the APA deciding whether the action denying, for example, a 404 permit is arbitrary and capricious.

After going through that whole process, which may take several years through appeal, if the litigant then loses and finds that the agency action was not arbitrary and capricious, they still may have a taking and they still start all over again now in the Court of Federal Claims, which again is a long process.

In addition, there is risk imposed by section 1500. If they make the wrong choice or they try to do both pieces of litigation together, they may be dismissed. If they make the wrong legal analysis and conclude it is a taking and go to the Court of Federal Claims rather

than a tort, they again may be bounced out of court under the current system. Neither the district court nor the Court of Federal Claims today can give complete relief.

The provisions of the bill would greatly increase the efficiency of the litigation process. It would give the citizen the choice of which court to go to, and I think a little competition in the judiciary, like in other parts of life, is good. It places a burden on the forum that is not having an efficient procedure and it allows for the experimentation and development of the best way to handle these cases.

Finally, it seems to me that the bill's giving the court these remedial changes is really the appropriate act of the Congress. It has supplied us money, it has improved the structure, and now it is giving us the remedial tools to do the job that the Congress has given us.

So I thank you, Mr. Chairman, for this opportunity to be here and I hope our views have provided some help to the committee. [The prepared statement of Judge Smith follows:]

PREPARED STATEMENT OF JUDGE LOREN A. SMITH

Mr. Chairman, on behalf of the United States Court of Federal Claims, I thank you for giving the court an opportunity to present its views on S. 605, The Omnibus Property Rights Act of 1995, that you and Senator Dole have introduced with numerous cosponsors. I also wish to thank the fine committee staff for the courteous and efficient treatment I and the court have received.

In addition to the duty to decide cases, it is the judge's duty to provide assistance to the Congress where the court's experience can aid in making the administration of justice more fair and efficient. With respect to today's testimony the court hopes to provide some information drawn from our day-to-day experience with taking and other litigation. We hope that the information on this type of litigation may contribute to the improvement of the process. I should also note that, with respect to the policy goals of this legislation, I and the court take no position as this is a matter within the discretion of the political branches of our great constitutional system.

The United States Court of Federal Claims is an Article I court whose jurisdiction was established in 1855 to do justice between the citizen and his or her government. As such, we are a court uniquely related to the Congress as our first cases were direct congressional referrals. This was at a time when the only monetary relief a citizen could obtain from a federal violation of rights was a private bill. Since 1887, the Tucker Act has provided the citizen with formal legal redress, as a matter of right, from a variety of violations. We still receive several congressional referrals along with the general and special jurisdiction cases filed each year. While the court's jurisdiction is predominantly over monetary claims in the contract, tax, and military personnel areas, we may give equitable and non-monetary relief as well.

With respect to S. 605, specifically the sections addressed to judicial review, they appear to the court to address a long-standing problem whose alleviation should help both the citizen and the government more effectively resolve disputes in the courts. In the balance of my testimony, I will focus on the individual provisions of the bill, but first let me provide some general comments on the problem that the legislation addresses.

The Fifth Amendment protects some of the most vital interests of any free society. While it guarantees the fundamental integrity of the human person in both its due process and taking clauses, it is also a recognition of the need for government to undertake policies that sometimes infringe on vital and fundamental personal liberties. The decision on where to draw the lines on what is an impermissible taking and what requires just compensation has largely been given to the courts with the Fifth Amendment as their only real guide. This often creates an apparent dilemma for judges, who know they are not elected. This dilemma requires the judges to risk the appearance of anti-democratic judicial law-making in order to honor their oath and decide the taking claim. Of course, a judge must decide a claim. However, perhaps in a partial bow to the other side of the dilemma, unique jurisdictional, ripeness, and remedial barriers have been created in this body of law. This makes takings cases expensive, unpredictable in their rules, and often not very just in their results to either the public or the private citizen. While it is the judge's duty to

make such decisions with the best available understanding of the Constitution's command, it is not the best way for the body politic to make these decisions for several reasons.

First, courts operate on a case-by-case basis without any general prescriptive rules. This means that neither government nor citizen has much guidance as to what will or will not be a taking. The last 73 years of taking jurisprudence (since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393(1922)) have failed to clarify the rules very much further than Justice Holmes' famous line which noted:

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.
260 U. S. 393, 415.

This is a clear indication that the legislative and executive powers of general statutory law may be needed to set general policies.

A second reason why courts alone are not the best way of dealing with this problem is that they do not have the general expertise and responsibility for government that is held by both the Congress and the President. Courts only resolve narrow disputes; after the fact. The law-making branches can create a system that minimizes and simplifies disputes as well as preventing some of them from occurring. Finally, the history of most of the branches of law we apply has showed a beneficial interrelationship of statutory law and judicial decision-making. For example, the enforcement of various provisions of the Fourteenth Amendment's due process and equal protection clauses has depended upon the combination of judicial decisions informed and directed by various civil rights acts. Neither pure judicial decision-making nor the simple enactment of statutes has ever fully—achieved the protection of individual rights or any other major governmental policy.

The proposed legislation also addresses a jurisdictional problem that tends to bring discredit upon the courts and make litigation in this area far more expensive. I refer to the current split in remedial jurisdiction between the Court of Federal Claims (generally monetary) and the district courts (generally non-monetary). Since at least the 19th century, the traditional split between the powers to give legal and equitable remedies has been the subject of criticism. Modern practice has tended toward uniting these remedies. Under the historical system that was established to give the citizen the right to legal redress against the government, the split of legal and equitable remedies still exists. It causes the citizen-litigant, and in the long-run the government, serious problems. As the late Senior Circuit Judge Philip Nichols, Jr. noted in a contract case:

While damages are supposed or imagined to provide a disincentive to violating the legal rights of others, the government here may even enjoy incentives to commit such violation in some circumstances, when equitable relief and tort liability are both unavailable. I am not advocating judicial law-making, however. The matter would appear to call for congressional attention as it involves the waiver of sovereign immunity." *Prudential Insurance Co. of America v. United States*, 801 F.2d 1295, 1303 (Fed. Cir. 1986) (Nichols, J., Concurring).

The split between legal and equitable remedies often has the effect of requiring the citizen to sue in two separate courts to obtain full relief in what is really one case. It may require a citizen to consecutively bring a suit in a district court challenging the propriety of an administrative decision or regulation, and after all appeals have been exhausted, to start all over again seeking monetary relief.

Further, the effect of 28 U.S.C. §1500¹ may even require the plaintiff to make a risky decision that could result in a dismissal of his or her monetary claim because the plaintiff had to challenge both the financial loss and the administrative decision at the same time. For this reason the court believes that the section of the bill repealing 28 U.S.C. §1500 will significantly improve the administration of justice at the court. Section 1500 today serves no useful purpose and is a serious trap for the unsophisticated lawyer or plaintiff. This is true inspite of the Federal Cir-

¹See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1173 (Fed. Cir. 1994). For a general discussion of the existing limbo that government claims litigants face resulting from §1500 and the need for remedial legislation, see The Nash and Cibinic Report, September 1993, Notes] 53, pp. 141-44; Payson R. Peabody, Thomas K. Gump and Michael S. Weinstein, *A Confederate Ghost that Haunts the Federal Courts: The Case for Repeal of 18 U.S.C. §1500*, 4 Fed. Cir. B.J. 95 (Summer 1994). The Supreme Court has indicated that any relief from the current impasse must come from Congress. *Keene Corp. v. United States*, 113 S. Ct. 2035, 2045 (1993) ("It may well be * * * that §1500 operates in some circumstances to deprive plaintiffs of an opportunity to assert rights that Congress has generally made available to them. * * * But the 'proper theater' for such arguments * * * is the halls of Congress. * * *").

cuit's valiant efforts to limit the section's potential for harm. In addition, since the doctrinal lines between a taking and a tort are anything but clear, even a sophisticated lawyer may not be able to figure out which court has jurisdiction today. And the risk of a wrong decision may destroy the plaintiffs claim because of the expiration of the statute of limitations.

This problem has been characterized as the Tucker Act shuffle, where it seems to some plaintiffs that the government is telling the district court there is no jurisdiction because this is a taking, and is telling the Court of Federal Claims there is no jurisdiction because it is a tort. It should be noted that in an area of our jurisdiction that has complete concurrent remedies, the tax area, (which accounts for between a quarter and a third of the total docket) the concurrent jurisdiction has been working very well in the view of all parties; the government, the private bar, and the tax community generally.

Section 205(a) of the bill confers concurrent jurisdiction upon the district courts and the Court of Federal Claims to address cases asserting claims under the substantive provisions of the Omnibus Act. The subsection provides that, notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, each court shall have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Act of Congress or any regulation of an agency as defined in the Act adversely affecting private property rights. This provision of the bill is consistent with the goal of increasing the fairness and efficiency of the administration of justice in the taking area. It eliminates much of the current remedial split between the courts that has contributed to increased cost and perhaps the related uncertainty of where and when to litigate what is in reality one cause of action. Further, section 205(a) is fully consistent with our earlier comments concerning the desirability of the repeal of 28 U.S.C. § 1500.

In the taking and contract areas the current jurisdictional and remedial split hurts government, citizens, and the integrity of the rule of law. The government often has to guess what is and what is not a taking. This hurts its ability to plan, budget, and make rational choices to protect the environment. Likewise, for the citizen, the current state of taking law gives minimal guidance as to when a suit has little chance of success and when it should be undertaken. Finally, the current state of the remedial split creates the appearance of a legal system designed to frustrate rather than fulfill the promise of the Fifth Amendment. This is a significant danger to a Nation founded upon a legal document and based upon a deep commitment to the rule of law.

Several jurisdictional provisions have, over the years, consumed inordinate amounts of resources of the private bar, government counsel, and the courts to resolve matters that can be solved by simple clarifications. Four such items are addressed below. Enactment of these provisions will permit litigants and the court to more often move directly to the merits of a case instead of diverting resources to the resolution of threshold jurisdictional issues.

(a) The first jurisdictional change amends 28 U.S.C. § 1491(a)(1) to provide that the Court of Federal Claims has jurisdiction over all non-tort claims against the government for *monetary relief* (and then deletes certain superfluous and confusing wording).

Prior to the Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879(1988), there was general agreement and a common assumption that the Court of Claims (and its successor court) had jurisdiction over virtually all non-tort claims against the federal government, founded on federal statutes or regulations, seeking money judgments, including those asserted in cases seeking review of final agency action (unless Congress had precluded any judicial review or had specifically designated another court for review of a particular type of agency action). Thus, prior to *Bowen*, it was generally assumed that the court had jurisdiction under the Tucker Act of agency-review claims of the type asserted by the plaintiff in *Bowen*. Indeed, the position of the Department of Justice and the Department of Health and Human Services (and the understanding of three dissenting justices, including the Chief Justice) in that case was that the Court of Federal Claims (then designated United States Claims Court) had *exclusive* court jurisdiction over the monetary reimbursement claims asserted by Massachusetts. *Bowen*, 487 U.S. at 890-91.

This clear understanding of the Court of Claims (and successor court) jurisdiction existed even though the Court of Claims' general jurisdiction was typically deemed limited to suits for "damages" or "money damages." See 487 U.S. at 914-16, 919.

The decision in *Bowen* narrowly construed the term "money damages" as used in the Administrative Procedure Act, 5 U.S.C. § 702, and concluded that the monetary relief to which Massachusetts was entitled under a federal statute was "specific" or

equitable relief, not money damages.² The decision and rationale in *Bowen* have resulted in two areas of confusion and potential disruption concerning the jurisdiction of the Court of Federal Claims. First, because the Supreme Court characterized the monetary relief sought in that case, although founded upon a federal statute or regulation, as equitable relief, it may plausibly be argued that the Court of Federal Claims, under current law, no longer has jurisdiction to address similar kinds of cases constituting judicial review of agency action. Second, given the Supreme Court's narrow definition of "damages" and its broad definition of "specific" relief; see 487 U.S. at 893-901, it could also plausibly be contended that the Court of Federal Claims now lacks jurisdiction to address many other claims long considered as damages claims within its Tucker Act jurisdiction, e.g., military and civilian pay claims, see 487 U.S. at 893, 919. "[I]f actions seeking past due sums are actions for specific relief * * * then the Claims Court is out of business. Almost its entire docket fits this description." *Bowen*, 487 U.S. at 919 (Scalia, J., dissenting). While this has not happened, and seems not likely to happen, the *Bowen* decision's language has certainly confused the law in this area.

Enactment of the jurisdictional provisions of this bill (Section 205(c)) will clarify the court's jurisdiction so that the common understandings which existed prior to *Bowen* will be plainly stated. The litigating public will know precisely where to bring claims for judicial review of agency action and other federal claims for monetary relief and have the assurance that the court with jurisdiction can address the claims completely. The bill will further clarify § 1491(a)(1) by deleting the potentially confusing and superfluous words "or for liquidated or unliquidated damages." See *Eastport Steamship Corp. v. United States*, 178 Ct. Cl. 599, 614, 372 F.2d 1002, 1013 (1967) (referring to the deleted wording as "that still-amorphous and unfamiliar part of our jurisdiction").

(b) The second jurisdictional change will extend ancillary jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 2674 and 2675, when a claim is related to one otherwise plainly within the subject-matter jurisdiction of the Court of Federal Claims. This will avoid wasteful and duplicative litigation by authorizing the Court of Federal Claims to grant complete relief or otherwise address and dispose of the entire controversy in cases within its jurisdiction when a related claim, although sounding in tort, may fairly be deemed to arise from the same operative facts as the primary claim within the court's jurisdiction. This provision will most frequently find application in contract and takings claims when the factual context giving rise to such claims may also be deemed to give rise to claims which courts may construe as tort claims. (The Court of Federal Claims already has jurisdiction over tort claims asserted by the government as counterclaims under 28 U.S.C. § 1503, see, e.g., *Cherry Cotton Mills, Inc. v. United States*, 327 U.S. 536 (1946); *Martin J. Simko Constr. Co. v. United States*, 852 F.2d 540, 542 (Fed. Cir. 1988), and referred by Congress pursuant to 28 U.S.C. § 1492, see, e.g., *Innocent Victims of the Occupation of Wounded Knee v. United States*, 229 Ct. Cl. 465 (1981); *Burt v. United States*, 199 Ct. Cl. 897 (1972).)

This provision cannot be interpreted or construed as providing general Tort Claims Act jurisdiction such as is exercised by the district courts, but only that which is ancillary to and directly related to cases and claims over which the court otherwise has jurisdiction, most likely those involving contracts and takings.

Other needed changes which will be accomplished by section 205(c) of the bill concern the power of the court to grant appropriate relief in all cases and clarify the applicability of the Administrative Procedure Act (APA) standard of review in appeals of matters from administrative agencies.

(c) This section amends 28 U.S.C. § 1491(a)(2) by inserting a new first sentence providing that in any case within its jurisdiction, the court shall have the power to grant injunctive and declaratory relief when appropriate. The court already has broad equity powers to fashion relief in military and civilian pay cases, 28 U.S.C. § 1491(a)(2), and in certain contract cases (pre-award bid protests), 28 U.S.C. § 1491(a)(3), and has additional declaratory judgment jurisdiction in certain tax cases, 28 U.S.C. § 1507. This amendment will extend similar power to fashion relief to other monetary claims within the court's jurisdiction.³

²"Damages" was defined as relief "intended to provide a victim with monetary compensation for an injury to his person, property, or reputation"; "specific relief" was defined to include the recovery of a payment of money based on statutory or regulatory entitlement thereto. *Bowen v. Massachusetts*, 487 U.S. at 893.

³For related background material concerning application of equitable doctrines and fashioning of equitable relief, e.g., rescission or reformation of contract, in federal claims litigation, see *Pauley Petro. Inc. v. United States*, 219 Ct. Cl. 24, 36-40, 591 F.2d 1308, 1315-17 (1979) (hold-

This provision is a corollary to the amendment clarifying jurisdiction over claims for "monetary relief," since, as explicated by the Supreme Court in *Bowen v. Massachusetts*, 487 U.S. at 893-901, many judgments for a sum of money constitute awards of "specific relief deemed equitable in nature, especially in contract cases and in most review-of-agency-action cases, including military and civilian pay and price support cases. Enactment of this provision will remove all doubt concerning the authority of the court to award complete relief and otherwise render appropriate judgments in cases within its jurisdiction.

(d) This section adds a new paragraph (5) to 28 U.S.C. § 1491(a) making it clear that in cases which constitute judicial review of administrative agency action, the APA standards of review set forth in 5 U.S.C. § 706 shall apply.⁴ One would assume, from the face of § 706 ("To the extent necessary to decision and when presented, the reviewing court shall * * * [duties of court reviewing agency action and scope of review defined]" (emphasis added)), that it is already plainly applicable to the "reviewing court" in every case which constitutes judicial review of agency action.

The former Court of Claims, in a number of opinions, referred to the Administrative Procedure Act, 5 U.S.C. § 702, as the legislative basis for a plaintiffs right to seek judicial review of final agency action of various kinds by a suit under the Tucker Act. *Sanders v. United States*, 219 Ct. Cl. 285, 300, 594 F.2d 804, 812 (1979) (military pay case; review of a decision of the board for correction of military records); *Jarett v. United States*, 195 Ct. Cl. 320, 326-29, 451 F.2d 623, 626-28 (1971) (civilian pay case; review of decision of Maritime Administration; "one need not burn the midnight oil to discover the relevance of the Administrative Procedure Act * * * 5 U.S.C. §§ 701-706"; "we must conclude that * * * [the suit] is a case coming within section 702, thereby giving plaintiff a right of review"); *Keco Industries, Inc. v. United States*, 192 Ct. Cl. 773, 781, 428 F.2d 1233, 1238 (1970) (bid protest case; pursuant to 5 U.S.C. § 702, "judicial review

of agency action will not be denied unless there is clear and convincing evidence of a contrary legislative intent"); *Hertzog v. United States*, 167 Ct. Cl. 377, 384 (1964) (military pay case; review of decision of board for correction of military records).

Likewise, decisions of the Court of Federal Claims have found the APA controlling in cases constituting judicial review of agency action. *Bradley v. United States*, 26 Cl. Ct. 699, 701-03 (1992), *aff'd per curiam*, 1 F.3d 1252 (Fed. Cir. 1993) (prevailing wage rate case; review of rulemaking decision of Treasury Department; review standards in 5 U.S.C. § 706 apply); *Simons v. United States*, 25 Cl. Ct. 685, 694-695 and n. 18 (1992) (dairy termination program case; review of decision of USDA, review standards in 5 U.S.C. § 706 apply); *Dory v. United States*, 24 Cl. Ct. 615, 624-26 (1991) (dairy termination program case; review of decision of USDA, review standards in 5 U.S.C. § 706 apply); *Pender Peanut Corp. v. United States*, 20 Cl. Ct. 447, 451-52 and n.3 (1990) (farm price support case; review of decision of USDA; review standards of 5 U.S.C. § 706 apply); *Stegall v. United States*, 19 Cl. Ct. 765, 769-70 (1990) (farm subsidy program case; review of decision of USDA; "The Administrative Procedure Act [5 U.S.C. §§ 701-706] * * * provides the framework for determining when a court may review an agency's determination. * * * The APA is not a jurisdictional statute.").

Despite this history of invocation and application of the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706, in cases before the old

ing that the Court of Claims could employ substantive equitable doctrines as an incident to adjudication of claims seeking monetary relief).

⁴The Administrative Procedure Act, 5 U.S.C. § 706, provides the following scope and standards for judicial review of agency action:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed;
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Court of Claims and the Court of Federal Claims, two recent decisions of the Court of Appeals for the Federal Circuit have clouded the issue concerning applicability of the APA in agency review cases before the Court of Federal Claims. *Mitchell v. United States*, 1 F.3d 1252, 1993 WL 190890 (Fed. Cir., June 4, 1993) (unpublished disposition) (military pay case; review of decision of board for correction of military records) (asserting without explanation that Claims Court has no authority to invoke the APA); *Murphy v. United States*, 993 F.2d 871, 874 (Fed. Cir. 1993) (military pay case; review of decision of board for correction of military records) (asserting without explanation that "the Claims Court has no authority to invoke the APA").⁵

The addition of the proposed new paragraph to 28 U.S.C. §1491(a) will end all doubt and confusion concerning the applicability of the Administrative Procedure Act, and especially the judicial review standards of 5 U.S.C. §706, to agency review cases litigated in the Court of Federal Claims. This provision will be of obvious assistance to litigants in such cases and promote the court's efficiency in handling such cases. This clarification will make plain, whenever there is occasion to construe 5 U.S.C. §§701-706, that with respect to a permitted appeal from agency action to any court with jurisdiction over the appeal, be it district, circuit, or Federal Claims, the standards of review set forth in 5 U.S.C. §706 apply and control.⁶

CONCLUSION

The United States Court of Federal Claims is uniquely "The Citizens' Court," and it is the principal forum for monetary claims against the United States. The court's jurisdiction originated in 1855, when Congress acted to resolve a problem of tremendous proportion. Because sovereign immunity barred legal redress of wrongs committed by the United States government, the only option for a citizen with a claim against the government was a private bill before the Congress. Thus, in each session of Congress, numerous citizens and groups sought private bills. As this system of private bills proved too burdensome, inefficient, and likely to spawn corrupt practices, Congress created the Court of Claims.

The creation of a court to do justice responded to a basic democratic imperative: fair dealing by the government in disputes between the government and the private citizen. Indeed, as *Abraham Lincoln* noted:

It is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.

Throughout its history, the Court of Claims strove to give vitality to the spirit of *Abraham Lincoln's* admonition.

Through various changes in the structure and names of the court, the basic jurisdiction of the present United States Court of Federal Claims has remained remarkably stable for well over a century. It is a jurisdiction where the federal government may be sued for its alleged violations of the rights of citizens. It is both a tribute to our Congresses and Presidents, as well as to our Nations' deeply ingrained respect for legal rights, that since 1855, the notion that government must deal with its citizens on the basis of legal equality has never been seriously questioned. The

⁵ More recently, however, a panel of the Court of Appeals for the Federal Circuit indicated that both the Federal Circuit and the Court of Federal Claims employ review standards prescribed by the Administrative Procedure Act, 5 U.S.C. §706, when conducting judicial review of agency action. *McCall Stock Farms, Inc.*, No. 93-5077 (Fed. Cir. Dec. 23, 1993) (slip op. at 9) (citing *Footo Mineral Co. v. United States*, 228 Ct. Cl. 230, 233-34, 654 F.2d 81, 85 (1981), for proposition that the ordinary standards for review of agency action reflected in the APA, 5 U.S.C. §706(2), governed judicial review of agency action in the Court of Claims and citing *Heinemann v. United States*, 796 F.2d 451, 454-55 (Fed. Cir. 1986), for proposition that the Federal Circuit and Court of Federal Claims both employ these same standards in reviewing agency action).

⁶ This more recent pronouncement is consistent with the review provision set forth in the bill. ⁷ It is sometimes mistakenly assumed that the Administrative Procedure Act assigned judicial review of agency action to the district courts. The judicial review provisions of the APA (originally constituting section 10 of the Act of June 11, 1946, Pub. L. 79-404; now set out, as amended, in 5 U.S.C. §§ 701-706) are emphatically not jurisdictional provisions. *Califano v. Sanders*, 430 U.S. 99, 104-07 and n.6 (1977) ("None of the [APA judicial review] sections * * * is phrased like the usual grant of jurisdiction to proceed in the federal courts. * * * Furthermore, * * * there is no basis for concluding that Congress * * * actually conceived of the Act in jurisdictional terms. * * * We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action. "); *McGrath v. United States*, 207 Ct. Cl. 978, 521 F.2d 1406 (1975) ("The Administrative Procedure Act is not a jurisdictional statute but merely outlines procedures for judicial review of administrative action. ")

judicial review sections of the legislation before this committee would further the mission of the court, by correcting procedural and structural problems faced by litigants before the district courts and the Court of Federal Claims.

The CHAIRMAN. Well, thank you, judge. That was very helpful.

Ms. Marzulla, let's call you next, and then we will go to your husband.

STATEMENT OF NANCIE G. MARZULLA

Ms. MARZULLA. Thank you, Senator. I am delighted to have the opportunity to speak to you today regarding the need for comprehensive property rights legislation. The need for such legislation has never been greater. Through its ability to regulate, government today is destroying the lives and livelihoods of countless of individuals all across the country, all in violation of the fifth amendment.

I am here today on behalf of millions of Americans whose property is being destroyed by excessive and overreaching government regulations. Yet, these same Americans have found that the path to obtaining compensation is neither just nor affordable. In fact, we are so besieged with requests for assistance from such property owners that we often compare our work to that of a doctor in the field practicing triage, using our limited resources to help only those most able to survive.

We represent individuals such as Bob and Mary McMackin who, in the Poconos, in Pennsylvania, after having obtained all the necessary permits and government approvals, built a house on dry land and lived in it for 4 years. Then one day they received a letter in the mail from the Army Corps of Engineers telling them that they had built on a wetland, and as a result they now face civil fines of up to \$50,000 per day and criminal sanctions.

We also represent another gentleman named Gregory Banford, a farmer in western Nevada, in one of the most arid States in the country, in one of the most arid portions of that State, who was told one day by the government that he could no longer receive water with which to grow his crops. This is despite the fact that his farm sits atop the largest underground aquifer in the United States.

These cases are far from random anecdotes. The common theme they all convey is of a government which, in its zeal to do good, has lost sight of its constitutional duty to pay for what it takes. Indeed, the dollar amounts of claims now pending before the U.S. Court of Federal Claims is reported to be well over \$2.5 billion, and this statistic does not even begin to reflect the countless other individuals who simply do not have the resources to litigate against the Federal Government. Indeed, few corporations today willingly engage in takings litigation against the Federal Government.

That is because regulatory takings litigation today is a nightmare that only the most well-financed and dedicated property owner can endure, and that is because the government has at its disposal a huge arsenal of defenses to throw out at the property owner to defeat his claim for just compensation, plus all of the statutes and regulations are written so as to favor the Government versus the property owner.

Finally, courts can employ this ad hoc factual inquiry which we have discussed earlier today to determine whether a compensable

taking has occurred, which has devolved into an exhaustive factual case-by-case inquiry. Look at the major takings cases now pending before the court.

1902 Atlantic—that was one case in which it took 12 years for the property owner to be compensated. *Loveladies Harbor*, another case which is pending—that case has also been in litigation for 12 years. *Florida Rock*—that case has been in litigation for 14 years, and yet the property owner has yet to be paid. *Whitney Benefits*—that case has been in litigation for 16 years, and yet the property has yet to be paid. *Hendler v. United States*—that case has been in litigation for 12 years. Plaintiffs in that case are all extremely elderly and they hope to live to see the day when the Government will pay them for the taking of their property.

In the face of such obstacles, most property owners simply give up or agree to onerous conditions attached to the use of their land. In short, a constitutional right available only to the wealthy and the most obdurate is no guarantee at all.

Comprehensive property rights legislation can put the notion of justice back into just compensation by ensuring that all property owners are paid for what the Government takes. It can also put an end to this lengthy and arduous litigation process which wastes everyone's resources, the Government's included.

Three things are needed in property rights legislation. First, it should draw a bright line for establishing a duty to pay for property that has been taken via regulation. Second, it should establish a quick and affordable means by which property owners can obtain just compensation, such as an arbitration procedure. Lastly, it should ease the procedural hurdles which bar property owners from getting relief from courts on the merits of their case.

In closing, let me say that Judge Jay Plager of the U.S. Court of Appeals for the Federal Circuit recently wrote in the *Hendler* case that the Federal Government can, like a thief in the night, break in and steal precious property rights. Recently, the House of Representatives locked the front and the back door against this thief by passing its own property rights bill, H.R. 925. Today, we are here to ask the Senate to lock the windows, too, by passing comprehensive property rights legislation.

Thank you.

The CHAIRMAN. Well, thank you.

Roger Marzulla, we ask you to make any comments you would care to make. You are an expert in this field and we would be happy to listen to you as well.

Mr. MARZULLA. Thank you, Senator. Having no prepared remarks, may I heartily endorse the remarks made by my wife. Indeed, it seems to me I have no alternative if I am going home after this hearing.

The CHAIRMAN. It is always good to have domestic agreement is all I can say.

Mr. MARZULLA. I would underscore, if I might, however, Senator, an important point that you made in your opening statement, and that is that this bill is crafted, as I understand it, so as to implement the guarantees that are already contained in the Constitution.

-Many of the situations that have hypothetically been posed today and in the debate over this bill in the House are situations in which the Court of Federal Claims would appropriately, we hope, grant relief, so that the argument with the bill's standards is for the most part an argument not with S. 605, but, in fact, an argument with the fifth amendment to the Constitution. It is an argument as to whether or not the individuals who pose those objections believe in the principle that some people alone should not be forced to bear the costs which, in fairness and justice, belong to the public as a whole.

Let me just point out two other items that have arisen in the course of the discussion with the Associate Attorney General just to make sure that there is no question on the subject. The bill clearly does not cover local zoning or other State and local activities. It is narrowly crafted to apply specifically to Federal activities.

Secondly, consistent with that, in response to Senator Feinstein's questions earlier, the bill has nothing to do with the allocation of water rights under State law, a function which, I might add, under our constitutional system which is left exclusively with the States. It covers only those circumstances, Senator, in which the water right allocated and vested as a property right under State law is then taken away by the Federal Government. Under existing condemnation law, that is a compensable taking and would be compensated if the Federal Government were to condemn those water rights, as it has frequently done.

With those brief comments, I am happy to respond to any questions.

[The prepared statement of Ms. Marzulla follows:]

PREPARED STATEMENT OF NANCIE G. MARZULLA

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Thank you for inviting me to appear before this Committee today to discuss the vital need for private property rights legislation. The need for property rights legislation was well-described in a recent decision by Chief Judge Loren A. Smith of the Court of Federal Claims:

This case presents in sharp relief the difficulty that current takings law forces upon both the federal government and the private citizen. The government here had little guidance from the law as to whether its action was a taking in advance of a long and expensive course of litigation. The citizen likewise had little more presidential guidance than faith in the justice of his cause to sustain a long and costly suit in several courts. There must be a better way to balance legitimate public goals with fundamental individual rights. Courts, however, cannot produce comprehensive solutions. They can only interpret the rather precise language of the fifth amendment to our constitution in very specific factual circumstances. To the extent that the constitutional protections of the Fifth amendment are a bulwark of liberty, they should also be understood to be a social mechanism of last, not first resort. Judicial decisions are far less sensitive to political branches of our great constitutional system. At best courts sketch the outlines of individual rights, they cannot hope to fill in the portrait of wise and just social and economic policy.

Bowles v. United States, 31 Fed. Cl. 37 (1994).

I serve as President of Defenders of Property Rights, the nation's only nonprofit legal defense foundation dedicated exclusively to the protection of constitutionally-guaranteed property rights. Through a program of litigation, education and legislative support, Defenders seeks to realize the promise of the Bill of Rights of the U.S. Constitution that private property shall not be "taken for public use, without just compensation". Defenders has a large national membership representative of the property owners, users and beneficiaries of the rights protected by the Constitution

and traditional Anglo-American property law. Founded in 1991, Defenders has since then participated in every landmark property right case in recent years, including *Lucas v. South Carolina Coastal Commission*, *Dolan v. City of Tigard*, and *Reahard v. Lee County, Florida* (for which we have sought Supreme Court review). Defenders has also devoted a significant amount of resources to analyzing legislative proposals concerning property rights at both the state and federal levels.

Despite the fact that the United States Constitution imposes a duty on the government to protect private property rights, in reality, they are often left unprotected. As reflected in various provisions in the Constitution, the Founding Fathers clearly recognized the need for vigorously protected property rights. They also understood the vital relationship between private property rights, individual rights and economic liberty. Property rights is the "line drawn in the sand" protecting against tyranny of the majority over the rights of the minority.

Today, environmental regulations destroy property rights on an unprecedented scale. Regulations designed to protect coastal zone areas, wetlands and endangered species habitats, among others, leave many owners stripped of all but bare title to their property. In recent years, courts have done much to restore vigor to the Fifth Amendment. For instance, in *Nollan v. California Coastal Commission*, the Supreme Court ruled that a land use regulation will be upheld only when it (1) serves a legitimate state interest; and (2) does not deny an owner "economically viable use of his land." Similarly, in *Lucas v. South Carolina Coastal Council*, the Supreme Court held that denying an owner all economically beneficial and productive use of his land requires payment of compensation unless the prohibited use constitutes a public nuisance as defined and understood by background principles of common law.

Nevertheless, cases in which land owners possess the resources and preserverance to prevail against a massive federal government are few and far between. Landowners are increasingly being deprived of most, if not all, economically beneficial uses of their land by government action and regulation. The Founding Fathers' intent for private property to be protected was clear. They could never have envisioned, however, the growth of a leviathan government which has occurred of late years. If the Fifth Amendment is going to be worth more than the paper it is written on, private property protection must be strengthened. Adopting legislation to protect property owners will help fulfill the promise of those who wrote the Bill of Rights.

I. THE UNITED STATES CONSTITUTION IMPOSES A DUTY ON GOVERNMENT TO PROTECT PRIVATE PROPERTY RIGHTS BECAUSE PROPERTY RIGHTS ARE AN ESSENTIAL ELEMENT OF A FREE SOCIETY

Within the Constitution numerous provisions directly or indirectly protect private property rights. The Fourth Amendment protects against unreasonable searches and seizures. The Fifth Amendment states that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment echoes the Due Process Clause, stating that no "State shall deprive any person of life, liberty, or property without due process of law * * *". Indirectly, the Contracts Clause protects property by forbidding any state from passing any "law impairing the Obligation of Contracts." U.S. CONST. art. 1, § 10.

The reason why the Constitution places such strong emphasis on protecting private property rights is because the right to own and use property is critical to the maintenance of a free society. Properly understood, property is more than land. Property is buildings, machines, retirement funds, savings accounts and even ideas. In short, property is the fruits of one's labors. The ability to use, enjoy and exclusively possess the fruits of one's own labors is the basis for a society which individuals are free from oppression. Indeed, there can be no true freedom for anyone if people are dependent upon the state (or an overreaching bureaucracy) for food, shelter and other basic needs. Where the fruits of your labors are owned by the state and not by you, nothing is safe from being taken by a majority or a tyrant. As a government dependent, the individual is ultimately powerless to oppose any infringement of his rights (much less degradation of the environment) because the government has total control over them. People's livelihoods, possibly even their lives, can be destroyed at the whim of the state.

One of the most eloquent commentators on the relationship between freedom and property rights was Noah Webster. The noted American educator and linguist said: "Let the people have property and they will have power—a power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other privileges." Not surprisingly, the world's greatest op-

pressors have also understood the intrinsic link between property rights and freedom. As Karl Marx explained in the Communist Manifesto: "You reproach us with planning to do away with your property. Precisely, that is just what we propose * * * The theory of the Communists may be summed up in a single sentence: Abolition of private property."

II. PROPERTY RIGHTS TODAY ARE UNDER SIEGE AND COURTS HAVE NOT GONE FAR ENOUGH IN PROVIDING FOR THEIR PROTECTION

Never before have government regulations threatened to destroy property rights on so large a scale and in so many different contexts as they do today.

In just two short decades, the United States has developed, from scratch, the most extensive governmental environmental protection programs in history. Environmental regulations have become an elaborate web of intricate laws and regulations covering every conceivable aspect of property use. For example, we have regulatory programs dealing with marine protection, safe drinking water and toxic substances control. We have regulatory schemes dealing with coastal zone management, ocean dumping, global climate protection and clean water (including the wetlands program); we have federal programs regulating air emissions, automobiles, endangered species, wild horses and burros, new chemicals, chlorofluorocarbons, waste disposal and the cleanup of soils and groundwater; we regulate surface mining, underground mining, forestry, energy production, transportation of all kinds and every conceivable aspect of the use and development of land, water, minerals and other resources. But we do not have a single statute dealing with the protection of private property rights.

A. Courts alone cannot adequately protect private property rights

In 1922, Justice Oliver Wendell Holmes declared that a regulation that went too far would be recognized as an unconstitutional taking of private property. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Since that time, courts have struggled with the question of when a regulation does, in fact, go too far. There has been no clear articulation of when the exercise of regulatory authority will violate the Just Compensation Clause. In 1978, after surveying fifty years of takings jurisprudence, Justice William Brennan threw up his hands in dismay and declared, "This Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transp. Co. v. New York City*, 438 U.S. 124 (1978). Justice Brennan then identified three factors which still guide courts in determining whether the Fifth Amendment has been violated: (1) the character of the government's action; (2) the reasonableness of the owner's investment-backed expectations; and, (3) the economic impact of the regulation.

Since 1978, the court has identified at least three areas which also constitute per se violations of the Fifth Amendment. In *Hodel v. Irving*, 481 U.S. 704 (1987), the Supreme Court held that destruction of the right to devise private property violates the Fifth Amendment. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Supreme Court determined that a property regulation which does not substantially advance its avowed governmental purpose also constitutes a taking. In 1992, in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2866 (1992), the Supreme Court held that destruction of all productive and beneficial uses of private property violated the Fifth Amendment.

Despite these efforts by courts to flesh out Fifth Amendment guarantees, there are still many open questions in takings jurisprudence. Indeed, the most troublesome question is the one posed in 1922—determining when a regulation "goes too far."

III. TAKINGS LITIGATION TODAY IS A LONG, EXPENSIVE AND ARDUOUS PROCESS WHICH ONLY THE MOST WELL-FINANCED AND DEDICATED PROPERTY OWNER CAN ENDURE

The scales of justice are unfairly tipped in favor of the government when citizens are faced with the threat of losing their property due to regulatory burdens. Not only are the laws drafted to ease the litigation burden of the government, but the costs of takings litigation can range in the hundreds of thousands or even millions of dollars, too high for the average citizen to bear. Consequently, many citizens faced with a government takings claim cannot pursue their rights under the Fifth Amendment. The government, on the other hand, does not face a similar shortage of resources (at least, in comparison to the individual property owner), and can often pursue a vigorous defense of the case without constraint. Adding to the hardship,

procedural hurdles often bar litigation on the merits of takings claims for anywhere from five to ten years, or longer!

A few examples of reported cases demonstrate how arduous and interminable the litigation of takings claims against the federal government can be:

- On October 2, 1980, Florida Rock Industries was denied a wetlands permit to mine limestone on its property in southern Florida. In 1982, the company filed suit against the federal government, alleging an unconstitutional taking. Following a 1985 judgment in the company's favor, the government appealed, and the case was reversed. In 1990, following another trial, the plaintiff won again, and the government appealed. Again, the case was reversed in 1994, and is now pending yet a third trial. More than fourteen years after the original permit denial, the company is still waiting to be paid for the taking.
- In 1983, the Federal Government placed groundwater monitoring wells on land owned by Mr. Hendler in southern California, and issued various orders forbidding certain uses of the property. In September of 1984, Hendler filed suit against the federal government, alleging a taking. After five years of bitter litigation, the case was dismissed in December 1989. Hendler appealed, and the case was reversed by the Court of Federal Appeals in the summer of 1991. The matter is now set for trial in 1995, more than twelve years after the government first physically invaded Hendler's property.
- In January 1979, Whitney Benefits Corporation was denied a permit to mine coal on land it owned in Wyoming. The company filed suit in the U.S. Court of Federal Claims in August 1983, and the case was dismissed the next year. In January 1985 the Court of Appeals reversed the dismissal and, following several years of litigation, the trial court entered judgment in favor of the plaintiff in October 1989. That judgment was affirmed in 1991, but has been followed by four more years of motions. Thus, more than sixteen years after the permit denial, Whitney Benefits has not still yet received payment for the taking.
- In May of 1982, Loveladies Harbor Inc. was denied a wetlands permit to develop property it owned in New Jersey, and filed suit in the Claims Court in April 1983. After extensive litigation in both the Federal District Court and the Claims Court, the plaintiff was awarded judgment in 1990. The government appealed, then moved to dismiss that appeal. Finally, in 1994, the Court of Appeals for the Federal Circuit affirmed the judgment for plaintiff—more than twelve years after the original permit denial.

IV. PROTECTION OF PRIVATE PROPERTY RIGHTS NEED NOT BE THE ENEMY OF ACHIEVING IMPORTANT SOCIAL OBJECTIVES

Legal and economic scholars have long argued that private property owners protect their property from environmental harm with greater vigor than the government. After all, it is the value of their property that will be diminished if the property is damaged. Individuals, guided by free market incentives, are often better stewards of the environment than the heavy hand of government. Nevertheless, there are instances in which the government will act to protect the environment by regulating private property. The purpose of the Just Compensation Clause is not to stop government from acting, but rather to avoid individual property owners from being singled out to pay the costs of achieving social good. In protecting the environment, we need to make sure that the Fifth Amendment's mandate—that if society as a whole benefits from government actions, then society as a whole should pay—be complied with.

We have heard the government regulators argue that requiring compensation for takings will prohibit the government from protecting enough land. Economically speaking, the Just Compensation Clause ensures that only property worth the cost of protecting will be regulated by requiring compensation for takings, the government is forced to weigh the costs and benefits of its regulatory schemes. The Just Compensation Clause thus protects property owners, government, and the environment property owners are protected from arbitrary government regulations that destroy the economic viability of their land. Government is protected because the Clause will slow the government from taking too much land, thus destroying the productive forces of the economy that finance government. The best stewards of land, the owners, will have the proper incentives to guard and defend it from environmental destruction with more intensity than any government bureaucrat or agency. Since no one has the right to use his property in a manner which would injure the public, those uses of private property which are public nuisances can be freely prohibited by the government. Finally, those areas deemed by society worthy

of the investment of resources to protect, or which private incentives fail to protect, can be preserved with limited and targeted regulation.

Critics of property rights proposals assert that such legislation is unfair because it only allows for the payment of compensation if property is taken. To be equitable, they assert, property owners should pay government for the benefits bestowed on them by regulation. The straight forward legal response to this position is that the Constitution does not speak to this issue. The Fifth Amendment, which contains the only express money guarantee in the Constitution, states simply that "[N]or shall private property be taken for public use, without just compensation." The obligation to pay property owners for property which has been taken simply attaches whenever government action works a taking. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Federal property rights legislation would merely enforce this constitutional right because courts have such difficulty in applying it in situations where property is taken due to confiscation regulations.

Additionally, examination of these so-called "free benefits" reveals such amenities are usually paid for by the property owners. Bridges do not magically appear—they are paid for by taxes imposed upon productive members of society such as property owners. The whole rationale of *ad valorem* taxes is to capture value added to property after purchase. Taxes come from profits made from ownership; and, special taxes are assessed from owners benefiting from services like sewer line renovation and mosquito abatement.

There is no free ride for property owners. They are not asking for a windfall from the government, just what they are constitutionally entitled to if their property is taken from them.

V. PRIVATE PROPERTY RIGHTS LEGISLATION WILL NOT BRING ABOUT ECONOMIC CHAOS

Opponents of property rights assert that legislation to compensate owners for the taking of their land will bankrupt the United States' treasury. Even if that is the case, the government should not expect to get a free ride on the backs of its citizens. Society as a whole should pay for what it takes, and not ask individual citizens to shoulder the entire burden of achieving a social objective.

More often than not, however, property rights legislation will actually *reduce* government costs over the long run in two important ways:

First, it requires government agencies to directly consider less expensive alternatives in proposals focusing on planning, which explicitly require government agencies to "look before they leap" by calling for a "takings impact analysis" before regulations go into effect. Compensation bills, which define a point at which a payment must be made, indirectly help keep the costs of government programs down because if government has to pay for what it takes, then government will automatically think before it destroys private property rights.

Secondly, by avoiding the taking of private property, property rights bills spare government the expense of fighting lengthy and costly litigation. Either compensation will be automatically required, or the government will have avoided the taking through careful planning. Would it not have made more sense and saved taxpayer dollars to have avoided these adverse judgments in the first place?

VI. PROPERTY RIGHTS LEGISLATION DOES NOT EMASCULATE THE GOVERNMENT'S ABILITY TO KEEP INDIVIDUALS OR BUSINESSES FROM POLLUTING

To dispel another myth about property rights legislation, the Constitution only protects a person's right to make reasonable use of his property. All landowners are subject to restraints on the use of their land, such as nuisance laws which prevent owners from using their land in a way that interferes with other landowners' use of their land.

The government has always been able to prevent "harmful or noxious uses" of land without being obligated to compensate the owner, as long as the limitations on the use of the property "inhere in the title itself." That is, the restrictions must be based on "background principles of the state's law of property and nuisance" already in place. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992).

As the Supreme Court explained, "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Id.* 2899.

VII. PROPERTY RIGHTS LEGISLATION WILL NOT HINDER THE GOVERNMENT'S ABILITY TO PROTECT PUBLIC HEALTH AND SAFETY

The Fifth Amendment never forbids the government from acting to prevent imminent harm to the public safety or health, or to diminish what would be considered a public nuisance. Further, property rights bills typically provide for the government to take whatever reasonable steps are necessary to protect the public welfare without paying an affected property owner compensation.

According to literature circulated by the environmental establishment, however, current legislative proposals to protect the right to own and use property are a direct threat to not only clean air and water, but to civil rights, health care, and even cracking down on topless bars!

Fear-mongering such as this is not based in fact. It would be laughable if it had not already been successfully applied. In Mississippi, a property rights bill was almost sidetracked when opposition to the bill called the legislation the "Porn Owners Relief Measure." They argued that owners of strip bars and pornography shops could claim a taking if the city tried to shut them down. Despite these allegations, the bill exempted municipality health and safety ordinances. The damage, however, was already done.

Common sense has prevailed in the many states that have already enacted laws to protect private property rights. Polls find that while people are in favor of cleaning up the environment, they are not supportive of regulations that deny people of their rights in order to do so. This creates the opportunity to draft sensible legislation that both respects nature and constitutional liberties.

VIII. A SOUND PROPERTY RIGHTS BILL MUST CONTAIN AN ADEQUATE DEFINITION OF "TAKING" AND PROMPT COMPENSATION TO THE PROPERTY OWNER

The central problems of current takings law are dual: (1) the ambiguity inherent in a case-by-case *ad hoc* definition of what constitutes a taking, and (2) interminable litigation prior to payment of just compensation for the property taken. Legislation must address both of these issues if it is to ameliorate the burden placed on the property owner and to have the salutary effect of providing greater certainty for the guidance of the government and its citizens alike. I wish to underscore the point that sound property rights legislation will not only cure the injustice when a single property owner is forced to bear a burden which, in fairness, should be borne by the public as a whole; it will also provide guidance for government agencies in implementing their regulatory programs so as to avoid unnecessary government interference with private property rights.

Private property rights legislation should define a taking in terms which can readily be applied by the Courts to specific factual settings. The federal courts have provided at least two approaches to defining what constitutes a taking. The First approach analyzes the issue in terms of the diminution in value caused by the regulatory action. [See, e.g. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987) and *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994)]. The second approach analyzes the issue by ascertaining whether a recognizable property interest, deedable to the government, has been taken. [See, e.g. *Loveladies Harbor Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)]. Either of these approaches would provide far greater certainty than the case-by-case, *ad hoc* approach described so despairingly by Justice Brennan in the *Penn Central* decision. By providing to the government a bright line definition of what constitutes a taking, Congress will not only foreshorten much useless litigation but, more importantly, will allow agencies to craft their own regulatory actions so as to avoid unnecessary takings of private property.

Second, private property legislation should provide prompt and fair compensation when a taking does occur. Current takings litigation is fraught with pitfalls for the property owner. The government routinely asserts defenses such as lack of ripeness, mootness, statute of limitations, filing in the wrong court (i.e., District Court versus Court of Federal Claims, lack of jurisdiction, lack of case or controversy—to name just a few. Eliminating this procedural nightmare would do much to put the "justice" back in "just compensation". Providing an arbitration remedy might also serve to minimize the time and expense invested by both sides in litigating these complex and frustrating cases.

Finally, Congress must be careful to provide in any such legislation the full measure of just compensation. This should include, in addition to the value of the property taken, interest representing the reasonable use value of the money denied the property owner from the date of taking. The successful property owner should also be entitled to recover attorneys fees and costs of the litigation, including expert wit-

ness fees (such as appraisers); for in many cases these expenses exceed the value of the property taken, at least when the litigation extends over many years.

I would be pleased to answer any questions that you may have.

The CHAIRMAN. Well, thank you so much.

Mr. Ludwiszewski, we are honored to have you here today. You have had extensive experience in this very difficult area that Senator Biden and others, including Senator Feinstein, have raised, and so we look forward to taking your testimony and I believe the committee will benefit from it.

STATEMENT OF RAYMOND B. LUDWISZEWSKI

Mr. LUDWISZEWSKI. Thank you, Chairman Hatch. As you mentioned earlier, I am Raymond Ludwiszewski. I am a partner at the law firm of Gibson, Dunn and Crutcher. Before recently entering private practice, I held a variety of senior positions at the U.S. Environmental Protection Agency, serving under then Administrator Bill Reilly between 1989 and 1993.

Before joining EPA, I served at the Environment and Natural Resources Division of the U.S. Department of Justice. In that role, I had the opportunity to help craft the U.S. position in a number of legal briefs concerning taking matters before the Supreme Court.

I would like to submit my provided testimony for the record and I will now very briefly summarize it in the interests of time.

The CHAIRMAN. Without objection, all statements will be placed in the record as though fully delivered.

Mr. LUDWISZEWSKI. In my view, S. 605 offers Congress the opportunity to make several important improvements in takings jurisprudence. First, it offers three substantive improvements to the court. It helps the Federal courts struggle with three issues which they have been battling for a number of years now—it appears, at least, since 1981, and perhaps from substantially before then.

What level of regulation goes too far and triggers a taking requiring compensation under the fifth amendment, is the first question. The second is how to handle a partial taking, by which I mean the absolute deprivation of less than the entire property interest. Third, what is the correct scope and parameter of the nuisance exception, which is well recognized and I think needed in takings law, but continues to run into some creative interpretation, perhaps, by eager governments and occasionally even by some of my brethren in the bar.

The second thing that S. 605 does is it offers three important procedural improvements. The first one is the jurisdictional clarification that Judge Smith so eloquently discussed. The second is the codification of the takings impact analysis that has been in place since Roger Marzulla worked on it in the second-term Reagan administration. Finally, it affords an administrative appeal process under two of probably the most controversial environmental programs at the Federal level, the Clean Water Act Section 404 Program and the Endangered Species Act Program. This, of course, is an opportunity to get some of the controversial and difficult permit issues of those programs solved without having to take up judicial time.

In my view, these six important improvements that the act offers are very valuable. They should help facilitate citizens' ability to

protect their constitutional rights, and I commend the new Congressional leadership for recognizing the need for this legislative guidance to the Federal courts to ensure the continuing value of citizens' fifth amendment rights and I look forward to assisting the committee in any way possible in this important legislation.

Thank you.

[The prepared statement of Mr. Ludwiszewski follows:]

PREPARED STATEMENT OF RAYMOND B. LUDWISZEWSKI

Thank you Mr. Chairman. I am Raymond B. Ludwiszewski, a partner in the law firm of Gibson, Dunn & Crutcher. I have been an environmental lawyer for my entire career. Before entering private practice, I held a variety of senior positions in the U.S. Environmental Protection Agency (EPA) between May 1989 and April 1993. In early 1991, EPA Administrator Bill Reilly designated me to serve as the Agency's chief environmental enforcement officer, the Assistant Administrator for Enforcement. Subsequently, Administrator Reilly asked me serve as the General Counsel. Between 1985 and 1988, I served in the Environment and Natural Resources Division of the U.S. Justice Department. In that role, I had the opportunity to help craft the legal briefs filed by the United States in a significant number of takings cases before the Supreme Court. I would like to begin by thanking the Chairman and the Committee for the opportunity to appear before you today to discuss S. 605 and the protection afforded private property by the 5th Amendment's "just compensation" clause.

Since the passage of the Bill of Rights in 1789, this country has protected private property from confiscation, or "taking," by the federal government without "just compensation." In the early years of the Republic, the federal courts had little difficulty administering justice under the "just compensation" clause. Most government takings were obvious and bold. Typically, the government physically occupied private property—either permanently or temporarily—by flooding the property or barracking troops on the property. In these straight-forward circumstances, the federal courts readily ordered the payment of compensation to the injured landowners.

As government began to intrude increasingly into its citizens' daily lives through regulation, however, the courts found it much more difficult to define the contours of the takings protections of the Bill of Rights. Confronted with a myriad of land use regulations, the federal courts were challenged to explain when a regulation "went too far" and worked a "regulatory taking" that required compensation. Since 1922, the federal courts have struggled repeatedly with this question and have done so with very limited success.

Indeed, the Supreme Court has expended considerable effort in recent years to explain the scope of the Constitution's "just compensation" protections. The long litany of post-1980 Supreme Court cases seeking to bring further definition to the "just compensation" guarantee are familiar: *Riverside Bayview Homes*, *Webb's Pharmacies*, *Midkiff*, *Agins*, *Loretto*, *Hamilton Bank*, *County of Yolo*, *First English*, *Keystone Bituminous Coal*, *Nollan*, *Lucas and Dolan*. While the Supreme Court has sought to clarify the law in this area, the lower federal courts have found interpreting the just compensation clause to be challenging. A number of celebrated takings cases have dragged on interminably in lower federal court dockets. For example, more than a dozen years have passed since the original complaint was filed in *Florida Rock*. The case has outlasted its original trial judge and has made two trips to the Court of Appeals. It is still pending. Similarly, the *Loveladies Harbor* case was filed in 1983. The case required numerous rulings by the Court of Appeals and was not resolved until 1994, more than eleven years after the original claim was filed. Against this backdrop of confused jurisprudence, I believe that S. 605 could serve a very useful function in providing the federal courts with additional guidance in this area through legislation.

In my view, congressional guidance on a number of the complex and undecided questions that currently surround regulatory takings laws would be especially valuable to the federal courts. First, there is the question of what level of over-regulation is necessary before compensation is required? As Justice Holmes once noted "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." On the other hand, this truism can be read too broadly. Government can seek to advance broad social purposes, such as habitat conservation or historic preservation, by imposing specific and costly restrictions on an individual's property rights. If we allow this regulation to go without compensation, then the individuals' property rights

have been confiscated just as effectively as if the government had occupied their land. To date, the courts have been unsuccessful in drawing a clear line between legitimate regulation and over-regulation that demands compensation. The guidance S. 605 provides to the courts on this important issue would be especially useful.

Second, the federal courts—including the U.S. Supreme Court—have been unable to determine a consistent view on the constitutional protections available for partial takings—absolute deprivations of less than the entirety of a citizen's property. For example, a landowner may have a large tract of land where only 10 percent of the property is subject to development restrictions due to wetlands regulations. Does the fact that the landowner can still use 90 percent of its land absolve the government from a "regulatory taking" of the remaining 10 percent? In the 1922 case of *Pennsylvania Coal v. Mahon*, the Supreme Court basically answered this question "no." Unfortunately, in the 1987 case of *Keystone Coal*, the Court essentially reversed itself and answered the question "yes." S. 605's direction to the courts on this important policy question could bring needed consistency to federal judicial decisions in this vital area.

Third, since development of the early common law of England, courts have acknowledged that no person has the unfettered right to make a noxious use of property. In other words, government can regulate, and even prohibit, nuisances on property without paying compensation. This long-recognized and well-reasoned exemption to the just compensation guarantee now threatens to swallow the rule, however. Indeed, some advocates have offered the courts a completely circular approach to this issue—because the land use contemplated must by definition violate the regulation that is being challenged as a taking, the activity must also by definition be a "nuisance" that does not merit just compensation.

Driven by a desire to avoid paying for regulatory deprivations, financially-strapped governments have become increasingly creative in defining what constitutes a "nuisance." Moreover, the courts are often reluctant to second-guess the determination of the elected representatives of the people as to what constitutes a noxious use of land in modern society. However, their reluctance can make the 5th Amendment just compensation guarantee a hollow promise. The direction provided in S. 605 on how courts should view the "nuisance exemption" would be particularly valuable.

In addition to offering useful guidance on the substantive issues outlined above, S. 605 contains several significant procedural improvements. For example, it affords the Federal Court of Claims and the Federal District Courts concurrent jurisdiction for both monetary and injunctive relief in takings claims. This will effectively end the "ping-ponging" of takings claimants between these two courts. Similarly, S. 605 allows for alternative dispute resolution to expedite the conclusion of takings claims. Title VI codifies the requirement that a Taking Impact Analysis be performed on new regulations. Implementation of these provisions should produce superior regulations that reflect careful consideration of the impact of new rules on citizens' rights. Finally, Title VII of S. 605 creates administrative appeal rights to afford affected property owners a ready opportunity to challenge jurisdictional determinations under the controversial Endangered Species Act and Section 404 Wetlands programs.

S. 605 should bring much needed clarity to takings jurisprudence. Moreover, S. 605 should facilitate citizens' ability to protect their constitutional rights without interfering with progress on environmental protection. I commend the new congressional leadership for recognizing the need for legislative guidance to the federal courts to ensure the continued value of each citizen's 5th Amendment rights. Look forward to assisting the Committee in any way possible on this important legislation.

The CHAIRMAN. Well, thank you.

Let me just ask one question of Judge Smith and then I will turn the time over to Senator Biden because I think you can answer Senator Biden's questions. First of all, Judge Smith, I want to thank you for your comprehensive and informative discussion of the jurisdictional issues involved in this very perplexing area of law. This committee feels very fortunate to have somebody of your intellect and ability to help us through these issues, and I want to thank you for coming here today. I would also like to add, and I hope you will be glad to know, that your request in the *Boles* case

opinion for Congressional action has not gone unnoticed, so we are trying to do something here.

One of the issues I would like to ask you about, though, concerns the Constitution. There are those who have raised questions about the constitutionality of the Federal Court of Claims exercising some of the authority that this bill will grant to it. As I understand it, the provision is perfectly constitutional, but I would like to hear your thoughts on the matter as chief judge of the Courts of Claims if you would be kind enough to give it to us.

Judge SMITH. I appreciate that, Senator. I have heard that issue raised over the past years once or twice, and it seems to me that it comes from a misapprehension of the role of article I courts as opposed to article III courts. Article I courts are staffed by constitutional officers just like article III courts. We are confirmed by the Senate and appointed by the President in the same manner, and we take the same oath, which is to really uphold and defend the Constitution of the United States and decide all laws under the Constitution.

Of course, in order to do that, we have to have the power, and it is inherent in the role of a judge, to declare actions which are against the Constitution unconstitutional. Otherwise, the hypothetical—if we had a law passed by the Congress saying that Presbyterians couldn't get tax refunds and a Presbyterian filed a suit in our court and said, I want a tax refund, we would be faced with either having to ignore the Constitution entirely and say, no, because you are a Presbyterian, you can't get a tax refund, or we would have to declare that action of Congress unconstitutional as violative of the first amendment.

Since the court began its history, really, it has declared actions unconstitutional. In the 1950's, it declared a loyalty provision which took a pension away, I believe, in *Steinberg*, unconstitutional. Currently, article III Federal judges are suing in the court seeking to declare a provision of the Social Security Act unconstitutional as violative of the article III protection of salary.

Almost everyday the court is dealing with claims that a particular action has either taken property, and therefore the lack of compensation violates the Constitution; contract provisions where contracts are breached, where the constitutional rights are implicated. In our military pay issue cases, we adjudicate fourth amendment questions of whether a search and seizure is improper and violates the Constitution.

So all through the history of the court, both during its article III and article I phases, and there have been several of those, it has been able to declare actions of either statutes or Federal executive actions unconstitutional, and no one, to my knowledge, has ever in opinions raised the question of whether an article I court can do that.

It seems to me that the real issue in any case is what kind of remedy the court is empowered by the Congress to use. The Court of Federal Claims for the most part, though not exclusively, gives money judgments. We do have equitable remedies in the bid protests and some tax cases and, of course, in military and civilian pay cases. We can order the Government through injunctions to do certain actions. We have declaratory relief in various areas.

So this bill would make, really, it seems to me, a remedial change and it would not only give us the power which has now been given us to find actions amounting to a violation of the fifth amendment without compensation, and therefore awarding compensation, but would give us also the specific relief, the injunctive and equitable relief, to give another kind of remedy which might in a lot of ways be less severe than the monetary judgment. So I don't believe that there is any constitutional problem with that part of the bill or any argument that I have seen raised that would create a problem.

The CHAIRMAN. Well, thank you very much. I have to step out for a minute, but I am going to turn to our Democrat leader on the committee and he will ask questions. I will be back in just a few minutes.

Senator BIDEN. Ms. Marzulla, could you give me some more detail on the case you cited about the, I assume, rancher in the part of Nevada that lost his or her—

Ms. MARZULLA. His.

Senator BIDEN. Can you tell me more about the facts of the case?

Ms. MARZULLA. I can, but I don't think you would be terribly interested because I am not holding it out as an example of a case that would be corrected by this law. I held it up as an example of the type of people that we represent.

Senator BIDEN. OK, all right.

Ms. MARZULLA. But I would be happy to go into the case.

Senator BIDEN. No, no. There are a couple of things I am trying to figure out here; first of all, how extensive the application of this law would be. For example, you have outfits like the League of Cities coming in in opposition to this. You have the Delaware State Legislature, a conservative legislative body, voting down legislation relating to takings, not the same legislation.

I was wondering whether or not the example you were using related to—you said a Federal action.

Ms. MARZULLA. No; I said a government action.

Senator BIDEN. I am sorry, I am sorry.

Ms. MARZULLA. I purposefully tried to be clear, but I should have been more clear. I apologize.

Senator BIDEN. No, no. That is all right. I just want to understand it.

Now, if I may ask you, Mr. Marzulla, would you explain to the committee again why this would not—well, let me ask it another way. Would the questions raised concerning the Reclamation Act of 1902, a statute which, as you know as well as I do, was written to help settle the West under which land owners in the Western States continue to contract with the U.S. Government to obtain water subsidies—would that be affected at all, or is it the contract that they have with the State government who, in turn, contracts with the Federal Government? Could you enlighten me on the Reclamation Act and whether or not this statute would be applicable to it?

Mr. MARZULLA. I will start, Senator, by saying that I do not purport to be an expert on the Reclamation Act. I know relatively little of its operation by reason of my experience with the Justice Department and my representation of private clients at the moment.

If I understand the question as I understood you to ask it, it was whether the Federal Government could be held liable if it were to seek to change the terms of existing contracts. It seems to me that that case is properly analyzed under contract law rather than under this bill, and it would be only to the extent that the right involved is a property right, and so recognized, that this bill would cover it.

Senator BIDEN. Well, that is the issue I am trying to determine here, and I would be happy to hear from anyone on this point. Right now, those of us in the East, along with everyone else in the country, subsidize the water that folks in the West get to drink and get to use. My mother, on Social Security, and others, pay taxes so that the mothers of my colleagues living in Nevada and Colorado and other parts of the country are able to drink water. Otherwise, there would not be sufficient water for people in the West to drink were it not for all of us spending, as we should, in my view, tens of billions of dollars to do that.

A slight aside. I always find it fascinating with my western friends when we say, well, maybe we should subsidize transportation in the East and they say, oh, no, that is not our obligation. I always used to kid my former colleague from Colorado, a very bright fellow who voluntarily did not run again. I used to say to him, well, I will make a deal with you; we will stop subsidizing your mother's drinking water if you stop subsidizing our folks being able to get on mass transit to go into work in the city of Philadelphia. But that is another issue.

Now, one of the things that the Reclamation Act was designed to do was to subsidize, give a break to, have people pay less money than they would ordinarily have to pay to irrigate their fields or to drink water. Now, as I understand it, the way it works is that a deal has been made at some point with the folks who are in a particular water basin or in a particular area of a State in the West and we say it is going to cost you "x" number of dollars to be able to get "x" amount of water.

Now, if the Federal Government comes along after the fact—you start farming in that area and you are accustomed to getting "x" number of gallons at "y" cost, and the Federal Government comes along now and says, you know, it is not an entitlement, we are not going to continue to ask the folks in Delaware to subsidize you at that rate; we are now going to subsidize you at less than that rate; so here is the deal, you get "x" minus one amount of water and you pay "y" plus two in compensation.

Now, that is going to be a change. That is going to affect the ability to farm that land or run that business. Forgetting whether it affects a third of the property to get you under this, is that a property right as envisioned in the meaning here of what constitutes private property in definition section 203 (5)(B) or (5)(A)? Is that a property right that gives rise to a cause of action under the takings legislation? That is my question.

Mr. MARZULLA. Senator, it is my understanding that subsidies are not property rights and that they are not covered by this bill. Specifically, the right to use or receive water goes to the quantity of water which is received, not the price at which it is received.

Senator BIDEN. Well, the quantity is subsidized as well, just to get the record straight. We subsidize the quantity. We build dams, the Federal Government. My mom builds a dam with her money in a Western State. Now, that relates to quantity. As more people go out there and populate the area, there are judgments made as to whether or not you can use that water that flows from that dam to build a golf course versus whether or not that water goes to continue to fund vegetable farming, subsidize vegetable farming, because the taxpayers in that region can't afford to build that dam. That affects the quantity available in certain areas because were not the dam built, the water wouldn't even get to certain areas. So it affects the quantity; we subsidize the quantity.

Mr. MARZULLA. If I may, Senator, water in the West—and I speak as a westerner who was surprised to find how cheap it was to ride the subways here because we didn't even have them in Los Angeles. There are essentially two kinds of water if you view it from the point of view of the Reclamation Act. One kind of water is a water right which is allocated through fairly complex processes established in each of the Western States.

Senator BIDEN. In conjunction with the Federal Government, right?

Mr. MARZULLA. Well, no. As a matter of fact, under Federal law, this is perhaps the only area that I know of in which the Federal Government actually submits itself to the jurisdiction of the State courts.

Senator BIDEN. Voluntarily, is that correct?

Mr. MARZULLA. Well, by statute, since the 1880's, the Federal Government has recognized that water rights are governed exclusively by State law.

Senator BIDEN. But we did that by statute, didn't we?

Mr. MARZULLA. Well, the statute says that, and whether or not there is a constitutional issue as to who owns the water, I suppose, has not been forced by reason of the fact that the statute is there.

But what I was about to say is that those who own water rights which are given to them under State law, it seems to me, are entitled to this protection, just as those who own land which is also confirmed by title laws under State law are protected against Federal Government takings.

Now, there is a second class of water users who, as I understand it, have a contract with the Federal Governments, contracts which I am not personally familiar with. To the extent that they do not hold State-granted water rights but hold contract rights, then it seems to me that there is a question which needs to be decided on the basis of what those contracts provide.

So I suggest that there are two different ways—that there are two classes of people, the people who simply get water under a contract, water owned by the Federal Government. If, as may be the case, the Federal Government under those contracts has the right to cut off that water at anytime, then it seems to me they are in a different position from the farmers in the Central Valley of California, say, or in the Denver area of Colorado. They own State-granted water rights. They do not come from Federal reclamation programs and the Federal Government has simply taken that water for use in the preservation of wildlife or endangered species.

Senator BIDEN. Well, then they would have no cause of action because it is a State matter, right? Under this bill, they would get no relief, right?

Mr. MARZULLA. Which class?

Senator BIDEN. Those who have the rights that flow from a contract with the State.

Mr. MARZULLA. If they have a right that flows from the contract with the State, but the Federal Government says, I am taking that water, I am simply cutting off your available water—you are entitled to 1,000 acre feet and I am taking 100 of that and I am holding it back to provide water for the trout or for the salmon, or whatever—it seems to me that is no different from a situation in which the Federal Government has decided, as it sometimes has, I am taking water for a military installation, or whatever, and I need 100 acre feet of water and I will condemn it.

Senator BIDEN. I see, so it would apply to any change on the part of the Federal Government in the use of water that is contracted by an individual with a State, but the State has access to the water because of federally subsidized actions that were taken to allow the water to exist.

Mr. MARZULLA. Not quite. Water rights are not contracted with by the State. They are actually owned.

Senator BIDEN. How are they owned? Well, let me put it another way. The water we are talking about is water where, if God had his way, none would flow, a little like the old wetlands kind of thing. If God has his way, there would be no water there, but the we, the hand maidens of the Lord, concluded that we would provide the State Federal money to build dams and reroute estuaries so water would flow to places where it would not otherwise flow.

Now, what happens, as I understand it—and I have no expertise in this area; I am truly trying to figure this out. The farmer who has a piece of land that gets “x” number of feet of water, or however it is calculated, from an agreement they have with the State to continue to divert water in his direction in a certain quantity—if the State concludes or the Federal Government concludes that because of the change in population, the change in requirements in the Denver area or the agricultural valleys in California, that they have to diver some water to provide for expansion in other areas and it takes such an action—it tells the State that the old deal we had to help you divert the water—now, we don’t want as much water diverted in that direction.

You are saying to me that that creates a cause of action under this statute for that farmer who now gets “x” number of gallons less. Is that correct?

Mr. MARZULLA. Not exactly, Senator. What I am saying to you is that this is one of the rare areas of the law in which it is the State that, in effect, has primacy. The Federal Government cannot say to San Francisco, I am shutting off the water that has been allocated to you by the State water resources control board.

Senator BIDEN. Put it another way, then. I understand your point. Put it another way. We rescind the Water Reclamation Act of 1902 and we say we will spend no more Federal tax dollars running the Hoover Dam. We are just going to let the reservoir drain. We own it. We are just going to drain it and we are not going to

maintain it any longer. Can we do that? That is going to deprive, as I understand it—again, I am no expert on water, but that is going to deprive Southern California of an awful lot of water. Could we do that?

Mr. MARZULLA. I suspect you could.

Senator BIDEN. Would that create a cause of action of a taking of property if we did that?

Mr. MARZULLA. I suspect not, and the reason is that you are not taking water and applying it to a Federal purpose, but instead you are simply altering one of the means of conveyance of that water. There may be compact and contract implications of all that, but what I am suggesting is the water really doesn't come from the Federal Government.

This is not like a Social Security check that is sent out by the Federal Government to a recipient. The water is owned by the State; it is allocated by the State. The Federal Government has some participation in the ways in which it is dammed up and the ways in which it is conveyed from point A to point B, but it is not the Federal Government which runs that water system.

Senator BIDEN. OK; now, let me ask another question for any one of you to respond. This legislation does not apply to local zoning laws, is that correct?

Ms. MARZULLA. That is correct.

Senator BIDEN. Should local zoning laws be subject to the same theory that this legislation is underpinned by?

Ms. MARZULLA. I think that is a very interesting question and, frankly, I think you have posed a very difficult question and one that we, frankly, have struggled with. I have to say that I think that zoning is a unique situation, and I am speaking here for myself. I don't know how the other people here will respond.

Indeed, the Court has treated zoning as a unique situation. The Court has talked about a reciprocity of benefits, and so forth, but that doesn't mean that anything that a local government does under the guise of zoning can never violate the Constitution. In fact, I point you to the *Dolan* case that was recently decided.

Senator BIDEN. I understand that. That was not my question. I appreciate that, but what I am asking you, and I would like you each to respond if you would, is this legislation—the definition of what constitutes property in this exact legislation, if it said that it applied not merely to Federal law but to all State and local laws, as well, and if the State of Delaware or the State of Nevada or the State of California passed the exact same law governing the actions of the State of California and its governmental agencies that were State, city, town, it would then apply to zoning, I would assume, would it not, or would it?

Mr. LUDWISZEWSKI. Yes, I think it would; written that way, yes.

Ms. MARZULLA. Yes, if they didn't—yes.

Senator BIDEN. What I am asking now is should it, should it. You deal with a national property rights organization, and you cited them yourself. A significant portion of people that come to you are talking about things that wouldn't be covered by this; they would be covered by State law. My question to you is would this be sound statutory policy for the States to adopt.

Ms. MARZULLA. Yes and no. I think States likewise should respect the property rights of its citizens. Indeed, they have an obligation through the incorporation doctrine, through the 14th amendment, to obey the fifth amendment. It sets a floor for their standard of behavior with respect to property rights.

Do I think 605 should apply to States? The answer is no. I think this bill is properly drawn to address the Federal takings issue and I think it should be so limited.

Senator BIDEN. Anyone else?

Mr. LUDWISZEWSKI. I completely agree. That is, in my view, the right analysis. I would be reluctant to extend this regime, as currently written, to the unusual, sort of peculiar intricacies of zoning law and everything else the States and local governments deal with. There might be appropriate legislation in that area, there might not, but I wouldn't use this one.

Senator BIDEN. Why would you be worried about this applying to the States? What raises that concern for you?

Mr. LUDWISZEWSKI. Well, the immediate thing that raises a concern for me is, frankly, when I have analyzed this I have dealt it with my greatest depth of experience. What would happen in the Federal environmental area? So I would want to think real hard as I went elsewhere with it.

Then, more specifically, when you think about zoning and everything else that the State and local governments are involved in, which, as you know, of course, are, under the Constitution, the true sovereigns—they have plenary police power; they are not a limited government like the Federal Government is. As a result of that, you just would have to think very carefully about all the potential implications and issues like reciprocity of advantage that you find under zoning laws.

Senator BIDEN. Judge, what do you think?

Judge SMITH. I feel I have somewhat disabled myself by focusing only on the jurisdictional section. Speaking not as a judge, but in my role as a constitutional law teacher at our law school, it seems to me once you expand the nature of federalism it argues against the Federal Government doing a lot of legislating for the States. I guess that is the unfunded mandates——

Senator BIDEN. I am sorry. I misstated the question then, if that is what you thought I meant. Would the same theory and definitions that apply in this law make sense for the State of Delaware or the State of Maryland to adopt? Would it meet the goal that all of you are seeking, which is to compensate people for the Government unjustly taking something that belongs to them called property? That is my question.

Judge SMITH. Well, again, I am somewhat constrained. I think, 205, would be good for any State's court of claims system, but I think also it has to just—again, this is my teaching experience and nothing to do with my role on the bench or expertise, but State law differs so dramatically in this area that I am sure for each State—one of the geniuses of our Federal system is each State has to adapt laws and rights for their own use, and a comprehensive yes or no I don't think is possible.

Senator BIDEN. Mr. Marzulla, do you have a view?

Mr. MARZULLA. I agree with everything that has been said, Senator. This bill was narrowly tailored to deal with Federal issues. The Federal Government is not involved in the business of zoning. Zoning implies the closeness of the relationship within the community among neighbors and the relationship between local government and its citizens, which is a different relationship from the relationship that Washington has with its citizens.

Frankly, I have not even thought about this bill in terms of how it might apply to zoning. It seems to me that is not what it was made for. It is sort of the wrong sized pair of shoes to try to fit on that foot.

Ms. MARZULLA. May I add one other thing?

Senator BIDEN. Sure.

Ms. MARZULLA. I was just going to say that the one thing that this bill does is that it adopts, in effect, the State court system wherein a litigant who is bringing a takings challenge against the State government currently doesn't have to split his cause of action or choose between forums, whereas in the Federal system he currently does. So in that sense, this bill borrows from the State system, in which a cause of action can be litigated in one forum.

Senator BIDEN. Let me ask you all another question, if I may. We had a discussion earlier with the prior witness about whether or not the Food and Drug Administration, the FDA, refusing to put a drug on the market—and the refusal to put that drug on the market has the effect of affecting more than a third of the value of the business, the property owned by an individual or a corporation—whether or not a cause of action would rise under this new legislation as that constituting a taking.

Notwithstanding that it may or may not meet the law as it relates to the issue of regulatory reform, would it be a taking? Would it create a cause of action? I would like to ask each of you your view on this.

Mr. LUDWISZEWSKI. Under my analysis, it wouldn't.

Senator BIDEN. Would you tell me why?

Mr. LUDWISZEWSKI. Yes; what I would ask the Senator to do is take a look at section—I think it is 203(5).

Senator BIDEN. Would you tell me the page?

Mr. LUDWISZEWSKI. I am sorry. Page 8.

Senator BIDEN. Page 8, OK.

Mr. LUDWISZEWSKI. Page 8 of mine.

Senator BIDEN. 203(5), private property.

Mr. LUDWISZEWSKI. This is the definition of private property which is the scope of what is protected under this law, as I understand it.

Senator BIDEN. Right.

Mr. LUDWISZEWSKI. (A) is real property. We would all agree that this is not real property. (B) is water rights. Again, we would all agree it isn't water rights. (C) is basically mineral and other similar rights. Again, I don't think anyone would argue that applies. (D) is contractual rights. There is no contractual right to put an unapproved drug on the market. (E) is property defined under State law; again, no State law right to put a drug that has not had FDA approval on the market.

So, basically, what you would be forced to argue if you wished to create a cause of action under this law would be to say that there was an interest sort of commonly understood under common law or by mutually-reinforcing understandings that allowed you to put onto the market an unapproved drug, and I think that would be very difficult to argue, since the FDA has been around for as long as it has and the understanding has been that you need to get FDA approval before you can put a drug on the market. So my sense is that that argument would fail and there is not a cause of action here because principally there is not a property right yet.

It gets more complex in your second hypothetical, which was the hypothetical where there is an approved drug; it has been on the market and now the FDA wants to pull it because of recently uncovered complications. I think that is probably not a cause of action either, and I know I am going beyond your initial question, because of the nuisance exception. But perhaps you want to ask other people question one before we explore.

Senator BIDEN. Judge?

Judge SMITH. Again, that conceivably could be a case that could come before me, but counsel's discussion sounds pretty reasonable.

Ms. MARZULLA. I concur with that.

Mr. MARZULLA. I agree with that as well. I might point you, Senator, to a Claims Court case called *Yancey v. United States*. It involved a Department of Agriculture regulation that was intended to control avian flu by constricting the movement of poultry. It basically said you couldn't ship poultry out of State if you were raising it within certain regions.

Somebody named Yancey had a turkey farm out in Virginia, and basically they were put out of business by this regulation even though their turkeys were not infected. The court found that under those circumstances, they were entitled to compensation because—

Senator BIDEN. They were, you say?

Mr. MARZULLA. They were, yes. They were entitled to compensation because their property, the turkey flock, had no disease, posed to threat to the public health, and so forth. I point out that case not by way of suggesting that there will be many such instances under the food and drug law or under the laws that we have to protect our food supply, but by way of suggesting that, in fact, there is that law out there already and we certainly do not see it impeding the ability of the FDA or the Department of Agriculture to carry out their responsibilities to ensure that our food and drug supply are made secure.

Senator BIDEN. But the answer to the question asked is that you do not think that the failure of the Food and Drug Administration to authorize the marketing of a drug in their stock that they have produced, that they have made, invented, and want to sell—that that is not property, that drug, and the loss of the money that comes from being able to put that drug on the market—that that is not property as defined within this legislation. Is that what you are saying, because that is what your colleague said?

Mr. MARZULLA. I would say in a lawyerlike way that there is a second argument, and that argument goes to the point that it is not a taking. Certainly, a product, if it has risen to the level of being

a product, is property and is protectable. If the Food and Drug Administration were to say tomorrow that you may not market broccoli because it actually has small quantities of known carcinogens—

Senator BIDEN. Let's take another one; let's talk about what is real. Naltrexone is a new drug that is being marketed and just recently approved that is designed to help treat alcoholism. It was initially designed to treat another disease, but it has been found to have a value for alcoholics.

Now, if the Food and Drug Administration refused to allow Naltrexone to be put on the market—it cost the Zeneca Corporation millions of dollars to blind-test Naltrexone; it has a potential value for them on the market of millions, if not tens of millions, of dollars. Assuming that was their sole product—they are a big company; it is not. A lot of small companies are doing this kind of thing.

Assume that was their sole product, and the FDA said, no, you cannot market Naltrexone. Your colleague said that Naltrexone does not fit the definition within the statute of private property or property. My question to you is do you agree with that reading of the statute?

Mr. MARZULLA. Yes, I agree with that reading of the statute, and I would add the further point that there is a belt and suspenders here that is found in the generic notion of the ability of the public to protect against harmful uses; that is, no one has the authority to market contaminated meat or unpasteurized milk or—

Senator BIDEN. Obviously, that is true, but just so we get this straight, the FDA is not saying that anything that you have in your arsenal to market is, per se, contaminated. Before we had an FDA, there was a cause of action that you could take against somebody who marketed contaminated meat. We came along and said there is going to be a thing called the FDA and we are not going to let you market anything that is a drug, for example, until you come to us and we determine whether or not—we don't let the marketplace work. We don't let the marketplace function as it ordinarily would have, so I think you are comparing apples and oranges here.

My question is there is a drug which the company says, this will not harm anyone and we are willing to take our chances and prove it. Now, if the FDA says, no, we think—obviously, you wouldn't submit the drug to the FDA if you thought it harmed anybody, if you had evidence it harmed anybody. But the FDA says we think it is harmful, or we don't think it is safe enough to allow you to market it, and they say you can't market it.

If that is my sole product and I am the inventor, I am the producer, I am the one who wishes to market Naltrexone, and they say I can't, do I have a cause of action under this bill, as you see it, as you read the bill?

Mr. MARZULLA. No, you do not.

Senator BIDEN. Thank you very much. Give me just a second, Mr. Chairman, and I will be finished with you all here.

Sir, you were with the EPA, is that correct?

Mr. LUDWISZEWSKI. Yes.

Senator BIDEN. Now, the Clean Water Act—you probably understand it much better than I do. If the EPA requires a manufacturer to invest in equipment to purify the effluent coming from that factory so that it is in compliance with the Clean Water Act, does the amount of money it takes to, say, put a scrubbing device on a containment vessel—that is the Clean Air Act, but put on a—

Mr. LUDWISZEWSKI. But, yes, there are any number of things you can do—chemical treat, biologically treat.

Senator BIDEN. Does the money it costs to take those actions to comply with the act—does that constitute property that puts you into a taking? It costs the company \$5 million to comply with the act. They have to expend \$5 million to comply with the act and they come along and say, which they do now in court cases, making me do that is taking my property; you are taking money out of my pocket because it is property; the property is the dollars I have. So is that private property or property within the meaning of this act?

Mr. LUDWISZEWSKI. They could probably successfully argue, actually, that the money lost is property under, I think—is it 203(5)(E), “any interest defined as property under State law?” Probably, under (F) as well; it probably would be commonly understood that money is either under (E) or (F) defined as property.

Senator BIDEN. Now, what I am confused about, if that is property—and I agree with you that it is—is how is the money expended on researching and producing a drug that you are not allowed to sell not property under that same section. You are being denied the ability to make use of the dollars you have expended. It is costing you money. The Federal Government’s action of saying you cannot market Naltrexone costs you money in the same way that the Federal Government is costing you money by saying if you wish to make widgets, you have got to build a tertiary treatment facility to deal with the effluent from the widget process.

Mr. LUDWISZEWSKI. I wouldn’t necessarily say it was in the same way.

Senator BIDEN. It is not in the same way. It affects the same dollars, though. You have put in money. An individual has expended tens or hundreds or thousands or millions of dollars, and the government is now telling you that is too bad.

Mr. LUDWISZEWSKI. Yes, but in the first mechanism, under the hypothetical with regard to the drugs, the company voluntarily undertook those expenditures in hopes of being able to get a drug approved. They were ultimately unable to do that.

Senator BIDEN. I see.

Mr. LUDWISZEWSKI. Under the second hypothetical, as I understood it, the government imposed a new regulatory requirement and that regulatory requirement commanded certain expenditures.

Am I misunderstanding the hypothetical?

Senator BIDEN. No, you are not, and if that is a legal distinction—and I don’t know; that is why I am asking the question—then I understand. What you have is you have regulatory requirements that if you are going to even test a drug, you have to meet certain regulatory requirements. It is a lot easier to go out and test a drug, for example, on a human than it is on a monkey or on a mouse to test what the effects are, but there are regulatory requirements that you say cannot test on a human, you cannot test in the follow-

ing way. So you drive up the cost of testing the product in the first place. Is that a taking? Is that property?

Mr. LUDWISZEWSKI. Those are, as I understand the hypothetical, sort of preexisting legal requirements, just like—although this is usually State requirements, just like there are requirements if you are going to build a building, you have to have a sprinkler system in it.

Senator BIDEN. Right.

Mr. LUDWISZEWSKI. If you get into the business of building buildings, you understand you have to do that. If you get in the business of—

Senator BIDEN. Right now, if you get in the business of building a brewery, you know there are certain requirements you have about the effluent that comes from that brewery.

Mr. LUDWISZEWSKI. Right, but I think your second hypothetical was a new—

Senator BIDEN. I misspoke. Right now, does this apply to the Clean Water Act as it exists now and is interpreted now?

Mr. LUDWISZEWSKI. Well, it would apply to any deprivation of property caused by any Federal law, so it could apply to any, after its passage, deprivation of property if it was passed.

Senator BIDEN. I hope you understand why I am confused. If it applies to the Clean Water Act as it is written now for someone who wants to get in the business of building a brewery, knowing full well what the Clean Water Act requires to be done to the effluent that comes from the brewery—it applies to that, we are saying. But now I am a drug manufacturer and I know full well before I try to develop a new drug that there are certain requirements, there are certain Federal regulations that limit my ability to develop this drug in what I consider a cost-effective way.

They are saying you have got to do a certain screen first and you have got to go through steps A and B and C, not even in terms of marketing it, just in terms of developing it to determine whether we can market it. If we passed a law saying that every bank that is insured by the FDIC has to have bulletproof windows and sprinkler systems and alarm systems of a certain kind, that is a regulation.

Mr. LUDWISZEWSKI. Right.

Ms. MARZULLA. Excuse me, Senator Biden. Could I jump in for just a moment, please?

Senator BIDEN. Please. I need help.

Ms. MARZULLA. I was just going to suggest that I think a useful way of thinking of regulatory taking at the outset is to go back to direct condemnation. I think if you start from condemnation, you—

Senator BIDEN. That is easy, though.

Ms. MARZULLA. It is, and the reason why I suggest that is because it puts an end, I think, to all of the problems you can get with hypotheticals. The sort of hypotheticals that you are raising now—to go back to the notion of condemnation, you ask yourself the question of what has been taken. Well, obviously, requiring someone to spend money is not a taking. The Federal Government hasn't taken something from you.

Senator BIDEN. I will sign on to this now if that is what this means.

Ms. MARZULLA. Exactly. You know, always start from the notion of what has been taken, so that is why you look at the diminution of value. That is, in a sense, a surrogate for something that has been taken by the Government. It is a property interest that has been taken.

Senator BIDEN. Do the rest of you agree with that?

Mr. MARZULLA. Yes, Senator. I think that is the point that was made earlier here, although perhaps not as clearly as it should have been, and that is that the hypotheticals which have been given out in the testimony of the Associate Attorney General, for example, suggesting that this is going to mean that you have to pay people not to pollute are simply incorrect.

Senator BIDEN. Well, that is good.

Mr. MARZULLA. The expenditure of money to comply with Federal regulations is not in itself a taking, nor is the expenditure of money to widen a door to provide access to the disabled.

Senator BIDEN. So it would not fall under this law?

Mr. MARZULLA. Those actions do not constitute a bill because this bill—

Senator BIDEN. By definition, then, they would not be subject to this law.

Mr. MARZULLA. Yes; the earlier question, I think, that you asked was whether money is property under the bill. Certainly, it is, and there are circumstances in which the taking of money—the seizure of a bank account, for example, if it is done improperly—would constitute a taking.

Senator BIDEN. That is great from my standpoint, if that is what we are talking about, essentially, condemnation, and the concept and the theory that underlies condemnation, but I don't think that that is what a lot of people who want this bill think it means because what we are talking about in most cases where Federal regulation is hurting people the most—the reason why business likes this is we are not going in and taking their property in a condemnation sense. We are going in and making them spend billions of dollars, if you add it all up. That is what the Federal Government is making them do.

Back in my State, the reason why I suspect an awful lot of the companies would like to have this legislation is they think—it is going to come as a surprise to them that a Federal regulation that requires them to spend more money to keep their business going is not a taking and it doesn't even get in the ball park.

The complaints I most get are, first, from my farmers, whom I agree with on the notion of what constitutes a wetland. They say you can't use your property. But if you are telling me that the Federal Government came along and said, by the way, you can use this property, but in order to use it what you have to do is you have to divert the stream into this area, or you have to put in the following reclamation system, I don't think my farmers would be any happier than they are now.

If all four of you are saying to me that a regulation that does not amount to a condemnation of the use of the property does not fall within this legislation because it is not a taking, then I am ready

to stop asking questions because you have answered all my concerns.

Ms. MARZULLA. Yes, Senator. It deals with inverse condemnation; i.e., condemnation.

Senator BIDEN. Explain what you mean by inverse condemnation.

Ms. MARZULLA. In other words, the Government can take property two ways. It can either formally exercise its powers of eminent domain and be very straightforward and say, we are taking this piece of property.

Senator BIDEN. Right.

Ms. MARZULLA. Or, alternatively, and what we have seen increasingly over the past 30 years with the creation of the regulatory state, government, instead of formally exercising its powers of eminent domain, regulates the use of the property.

Senator BIDEN. Well, that is my point.

Ms. MARZULLA. In so doing, it condemns private property.

Senator BIDEN. So, then, these cases would fall in. So, in fact, what you are saying is that if I am a manufacturer of drugs and I am out there and I have got my plant setup and I am ready to go and I have got this new idea that I am going to come up with a drug that diminishes the craving for cocaine—there are lot of those that are out there now, a lot that are being proposed. I get working on it and all of a sudden the Federal Government comes along and says, wait a minute, you can't do it this way; first of all, the area in which you are doing this testing is contaminated; you have got to erect a contamination-free section of this factory.

I say, well, that is going to cost me \$2 million. They say, if you don't do it, you are shut down. Now, is that a taking? The answer is it is. I can help you all out. It is, OK? It is. That is what the Supreme Court has been saying is a taking. It gets you into the game. The question is whether or not it is a legitimate regulation or it is a taking, a taking that requires compensation.

Maybe I am not asking the questions very well, but I think you are kidding yourselves or trying to kid me, one of the two, because if the FDA comes along and says, look, in order for you to even test for this drug, you must expend enough money to have a sanitary area, all your folks must wear hair nets, all the people who walk in must have clothes on that are similar to that worn by physicians, and you say, wait a minute, you mean I have to go out and buy hair nets, I have got to go out and buy these clothes, I have got to have air-tight locked doors, I have got to do this under these circumstances—wait a minute, Biden; what are you doing to me?

Ms. MARZULLA. Senator, if I could just say one thing, I think that the disconnect we are having here—you know, we keep responding negatively to all the hypotheticals that are posed.

Senator BIDEN. Yes.

Ms. MARZULLA. It is not that we are suggesting that this isn't a large problem, the problem that the bill is trying to address, because it is. There are a huge number of Federal regulations which have the effect of taking private property rights, but it is just that the hypotheticals that are being posed are sort of in left field and they are not the ones that we normally think of or that, in fact, do affect private property rights.

Senator BIDEN. I understand that you are saying that they might not normally, but what I am trying to get at here—

Ms. MARZULLA. Or even ever.

Senator BIDEN. We have to have a normative value here. I mean, what are we talking about that requires compensation by the government? That is what this is about, and the truth of the matter is the vast cost to the economy is not in the confiscation of pieces of land. That happens all the time, like the lovely lady who testified here today about what happened to her property, like the cases that happened with the coastal zoning act in California, like what happened in the Carolinas. That is property taken. They take away your use of that property in the wetlands legislation, but that is not where the big dollars are. That is not where most of the takings occur, if you mean takings. That is not where most economic interests are affected.

Where they are affected is if you say, hey, look, in the Clean Air Act, no longer can the Marcus Hook Refineries that spew air into my neighborhood—no longer can they continue to make gasoline the way they did. They have got to invest tens of millions of dollars on scrubbers on top of those big smoke stacks to take the sulfuric acid out of the air before it gets there. They have turned around and said, wait a minute, you are affecting my bottom line; you are taking my property by making me do that; it is a regulation for which I should be compensated. That is what they are saying.

Mr. LUDWISZEWSKI. My answer remains the same. That is not a taking.

Senator BIDEN. Why is it not a taking?

Mr. LUDWISZEWSKI. Because they had no vested property right recognized under State law or anywhere else to make gasoline on the assumption that they could spew SO₂ into the air.

Senator BIDEN. I find that fascinating because until we passed the law they could spew SO₂ into the air.

Mr. LUDWISZEWSKI. Right, but they had no vested property right that allowed them to do that. They were dealing in an area that was not yet regulated.

Senator BIDEN. So once we regulate it, if we have a—what is the basis the court is supposed to look at, then? Under this legislation, it doesn't say whether or not there was a reasonable basis for the regulation. It doesn't say, as I read it, that it has to meet a tort standard. It doesn't even say it has to meet a nuisance standard.

It just merely says if the effect on my property is one-third—and my property is my dollar, my bottom line, as well as the plant and equipment and piece of land I own; that is my property. If the effect on it is one-third, I am now in the ball game and the Federal Government can't do it without paying me money. That is why I think we are kidding ourselves here. I mean, this is a bit of sophistry, isn't it?

I mean, if you are telling me that any regulation that the Federal Government passes, for which there is a reasonable basis to pass it—we don't want SO₂ in the air. The Federal Government says that is a bad thing; it smells. It doesn't smell, but let's say you have a noxious odor in the air. It doesn't harm anybody; it just smells. It may be a nuisance.

The CHAIRMAN. You just broke the code.

Senator BIDEN. So if it is a nuisance, then you are able to do it, but how about if it is not even a nuisance? If it is a nuisance, the government can do it; it can stop it. But what happens if it is not even a nuisance? We just say, hey, we don't like the color that is coming out of that smoke stack. The point I am making here is this gets you into a taking. You can take someone's property by requiring them to take certain actions to meet a government regulation.

Ms. MARZULLA. Well, Senator, I think you are right. I agree with you.

Mr. LUDWISZEWSKI. Sure, you can. We have talked about the SO₂ hypothetical. Let me give you a different hypothetical. Let's take a traditional 404 wetlands area hypothetical where——

Senator BIDEN. Wetlands are easy because wetlands relate to everything everybody knows.

Mr. LUDWISZEWSKI. Well, let me——

Senator BIDEN. I would be happy to do it, but I want you to compare apples and apples. That is a piece of land. You say you can't use this piece of land. We can walk out, we can step on it, we can identify it, and the farmer or the business owner or the property owner can say, look, that makes up over a third of my land; what you are doing is you are depriving me of my property right to use that land. I understand that.

Mr. LUDWISZEWSKI. That is the distinction I am trying to make. In the second hypothetical, there is a vested property right. Someone owns the land. In the first hypothetical, there is no vested property right emit SO₂. I mean, you can change, perhaps, that first hypothetical.

Senator BIDEN. I hope the rest of your team agrees with that.

Mr. MARZULLA. You know, Senator, it seems to me that we don't disagree nearly as much as you may have thought when you walked in the door. You may find that your greater disagreement is with Mr. Schmidt. The Justice Department, as you may or may not know, filed a brief saying that Ms. Dolan, for example, in the Supreme Court last year shouldn't have won, that it was OK.

Senator BIDEN. I understand that.

Mr. MARZULLA. They have defended the wetlands cases that Nancie referred to.

Senator BIDEN. I don't represent Ms. Dolan. I represent the State of Delaware, and as a Senator from the State of Delaware I have been arguing with the Federal Government over wetlands legislation for 6 years. I disagree with the Federal Government's judgment on wetlands legislation. What I am trying to find out is the extent to which this affects existing environmental legislation beyond wetlands.

Mr. MARZULLA. And endangered species and Superfund.

Senator BIDEN. That is what you want to figure out. I am just trying to get them one at a time.

Mr. MARZULLA. Right. What I am saying is that is what this bill is aimed at. That is why you may be surprised to find that this bill isn't aimed at and isn't sponsored by and isn't somehow the product of the industries that you have talked about.

Senator BIDEN. I am not saying it is. Don't put words in my mouth any more than I put them into yours about what my purpose is in asking these questions. My purpose in asking the ques-

tions is if the Clean Water Act and the Clean Air Act require you to expend dollars that exceed a third of the value of your company, does it get you into this legislation. That is my question.

Even though you don't like my hypotheticals, they are literally the ones that we deal with everyday. We deal with whether or not a drug company can, in fact, market a product that the FDA says, no, we haven't proved beyond a reasonable doubt that that is harmful to the public, but we don't think you are ready for it. I come back and say, look, I am going out of business if you don't let me get this on the market; I have invested \$25 million. This really happens. I have invested \$25 million and you won't let me market it; for 10 years you have had this before you and now I am going bankrupt; my creditors say come in; you have to compensate me for that money I invested.

That is not a wacko hypothetical. That is real, and I am asking you whether it falls within the purview of this act. You are telling me it doesn't. I don't see how it doesn't.

Mr. MARZULLA. I don't think that the hypothetical you have given us now is quite the same as the others.

Senator BIDEN. Well, does that one fall within it?

Mr. MARZULLA. If the Government—there are several principles in operation here. Obviously, the Administrative Procedure Act deals with this issue. It deals with unreasonable delay. If the drug company—and here is the analogy to the wetland case—if that drug company went to Federal district court and the Federal district court said, yes, there has been an unreasonable delay, there is no reason for the FDA to do what it is doing, and it issued an order and the FDA still didn't do anything about it and the business went down the drain and that business owner were left entirely penniless simply by reason of—

Senator BIDEN. A regulation.

Mr. MARZULLA [continuing]. A regulatory delay that had no purpose whatever, then I think you would have a takings case.

Senator BIDEN. No, no. The regulatory delay—the FDA would argue, as they always do, that there is not sufficient proof that you have given me, drug manufacturer, that this isn't going to harm people.

Mr. MARZULLA. Right, and the court would have to decide that under the Administrative Procedure Act. I am suggesting that the takings case occurs only if the drug manufacturer can bear the burden of proving in court that the FDA is wrong.

Senator BIDEN. Well, I don't think that is the reading of this statute. I don't think that is true, but I am not going to get any further. I thank you for your indulgence, Mr. Chairman. I have no further questions. I wish you would all read the statute again, and if it passes I hope you are right and I am wrong. But you know I am right and it will be wrong.

The CHAIRMAN. Well, we all have confidence in Senator Biden.

We want to thank each of you for coming. This has been a particularly stimulating panel and we appreciate having you here. Judge, welcome to the committee. We think very highly of you and appreciate the work you do everyday down there.

Judge SMITH. Well, I thank, Mr. Chairman, both you and Senator Biden. I hope in the last 10 years I haven't disappointed the

judgment that you both made of sending me to the bench. I would ask Senator Biden as a personal matter to give my best to my former colleagues at a great law school, and particularly Bill Quillan.

Senator BIDEN. I will, judge.

The CHAIRMAN. That is great.

Judge SMITH. Thank you both.

The CHAIRMAN. Thank you so much. We appreciate the efforts you have made.

Our last two witnesses will be Professor Carol Rose and Mr. John Chaconas. Professor Rose comes from the Yale Law School, and Mr. Chaconas comes from St. Amant, LA.

We will take you first, Professor Rose, and we would like you to summarize. I needed to leave, really, an hour ago. We would like you to summarize, if you could, in 5 minutes or less, and hopefully we can complete this hearing in a few more minutes.

PANEL CONSISTING OF CAROL M. ROSE, PROFESSOR OF LAW AND ORGANIZATION, YALE LAW SCHOOL, NEW HAVEN, CT; AND JOHN J. CHACONAS, ST. AMANT, LA

STATEMENT OF CAROL M. ROSE

Ms. ROSE. Thank you, Senator. I will do my best to do that.

The CHAIRMAN. Thank you so much.

Ms. ROSE. I should say who I am. I am Carol Rose. I am a teacher of property and environmental law and some natural resources at Yale. I also want to say that I am a very committed proponent of property rights. I guess I should mention I was a law student at the University of Chicago and I was a student of Richard Epstein's, so I know well his views.

I want to talk to you about the tradition of property rights in American law, and I also want to talk to you about why I think that the takings proposals that are up now seem to disrupt that tradition. I don't think it is a surprise that our history has a very strong tradition of property rights and protecting individual property rights. This is really essential to a free enterprise system, and I don't think there is any question about that.

Our legal system, however, also has a very strong tradition in defense of public rights and what were explicitly called public rights in the 19th century. These public rights concern resources that have wide and diffuse impacts and are not very easily reduced to private property, but are still nevertheless very important to large numbers of people. Traditionally, they include air, water, waterways, and wildlife stocks.

Public rights act as a restraint on private uses of property, and that is because private land owners when they are using their property also use resources in common with other people. Some of these are very simple. When you burn trash, the smoke affects your neighbors' air. You may be able to work this out in your neighborhood. You probably can. Nevertheless, your use of your land is affecting other people's property as well.

When you burn sulphur, as you were mentioning, Senator Biden, the emissions from your plant may affect land quality and timber resources 1,000 miles away. When you fill riparian land, you may

alter a water body and you may alter the water flow that disrupts your downstream neighbors, as I think Mr. Chaconas is going to talk to us about, and you may disrupt uses of others much further away.

Those common uses, as it were, piggybacked on to private ownership, don't matter very much if there are only a few of them and if the underlying resource is very large and can correct the problems. But if a lot of people do the same thing, they can use up or destroy all of the common resources, and those common resources are valuable to everybody.

In the American legal tradition, that is the occasion for the active assertion of public rights. What that means is that the public, through legislators, restrains individual uses of common resources so that they are not damaged for everybody. That is why as long ago as the 13th century, London restricted the burning of coal, so that the people could breathe the air within that city. That is why American legislatures in the 19th century started restricting hunting and fishing in wildlife stocks that were becoming depleted. That is why those same legislatures took some at least halting steps to try to control air and water pollution.

Now, those assertions of public rights are not necessarily occasions for compensation, and they have not been in American law. The fact that land owners and others have been using common resources does not give them any permanent rights to continue. There is case law on that. I think the major example is *Hadacheck v. Sebastian*, a 1915 case about air pollution.

Nevertheless, there are sometimes reasons for compensation. Those are usually cases where a legislative action disturbs an owner's reliance and settled expectations. Takings jurisprudence usually concerns that kind of case, those cases of reliance, and that is why courts look for investment-backed expectations. That is also why those issues are so fact-specific.

There are a lot of variations in owners' reliance. There are a lot of variations in the owner's commitment of resources, and there are also great variations in the reasonableness of their reliance, given background, law, and custom. But the basic idea in takings jurisprudence is to secure fairness to individual owners, while at the same time preserving the general public's ability to manage diffuse resources and avoid what is often called the tragedy of the commons.

My own view is that takings legislation of the sort that we are seeing can disrupt this kind of delicate balance. The compensation requirements that are spelled out in these proposals are far beyond constitutional requirements, as other witnesses have said, and they are actually much greater than owners have any reason to expect. Insofar as this legislation discourages assertions of public rights, it recreates a tragedy of the commons, allowing holders of land to use that land holding as an access to use up much wider resources more or less at will.

Finally, I think there is a more subtle point. Property regimes depend a great deal on respect for the rights of others, and that includes respect for the rights of the public as well. The Wall Street Journal had an article on Tuesday that suggests how much these

proposals are already encouraging what I think most of us would think of as private overreaching against the public.

Water subsidy holders are saying that they have permanent rights. Grazing permit holders are saying the same thing. Miners, who have already been heavily subsidized, claim that their property is being taken because they were not regulated and now have cleanup costs. The International House of Pancakes' example about the ADA was brought up earlier.

These are assertions of special entitlement that don't just disrupt environmental law, which we all know is at stake here. They also disrupt the free enterprise system. The object of a free enterprise system is not simply to enhance private wealth. It is, rather, to enhance the sum of private and collective wealth, things that we own individually taken together with the things that we enjoy in common. Those are both essential in a free enterprise system and they require respect for public rights as well as private.

I will be glad to take questions.

[The prepared statement of Ms. Rose follows:]

PREPARED STATEMENT OF CAROL M. ROSE

MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE: My name is Carol Rose. I teach at the Yale Law School; my subjects are property, environmental law, and a variety of areas related to natural resources, particularly in their historical context.

I would like to begin by thanking the members of the committee for this opportunity to speak to you today about proposed legislation on "takings" issues.

My testimony today is aimed at clarifying some property concepts relating to takings jurisprudence. I will concentrate on the common-law and historical legal principles relating to these issues.

Briefly, my position is that historic Anglo-American legal principles recognized the importance of private property rights, but also recognized what were called "public rights," particularly in resources that are not easily turned into private property—air, water and fish and wildlife stocks. Takings law has been aimed essentially at balancing private and public rights, and it is principally a judicial function. I believe, however, that there are important ways, in which legislatures can use new forms of private property in order to further both private and public rights, especially in relationship to the environment.

1. *Private property rights are essential in a free-enterprises regime.* Property's importance for capitalism has been recognized at least since Locke, and later Blackstone. An owner must have reasonable secure expectations of continued ownership if he or she is going to expend efforts to improve resources. Similarly, reasonably secure definitions of property are essential to trade, since trading partners must know who has what in order for their trades to mean anything. These elementary building blocks of capitalism—encouragement to labor and trade—are important reasons for security of property, and they are very widely recognized in the common law of property.

2. *Property rights need to be reasonably secure, but their content can change with changing conditions.* Property rights in traditional law have never had fixed characteristics that apply under all conditions and for all time. Indeed, it would be undesirable and probably impossible for property rights to have such fixed definitions. This is a point that is recognized even by such libertarian writers as Richard Epstein.¹

Since it is costly to establish property rights, there is no point in doing so until the need becomes clear. Both Locke and Blackstone gave narrative versions of the origins of property rights. In these narratives, people did not bother to assert property rights when natural foodstuffs were plentiful, but only defined property rights when the relevant resources became more scarce. This is in fact a typical pattern in common law property rights; for example, grazing rights were only very loosely defined in the early years of Western settlement, but they became much more

¹ Richard Epstein, Private and Common Property, in *Property Rights* 17, 41 (1994).

sharply defined as more settlers arrived with more grazing animals, which of course raised the possibilities for strife over grasslands.²

This pattern responds to the benefits and costs of establishing defining property rights: unrestricted common usage is not a problem when resources are plentiful, but with increased congestion, open access resources may deteriorate—a situation often called “the tragedy of the commons.” Individual private property is one response to congestion and strife over open-access resources, but it is not the only response, and indeed it is not always the best response, since some resources require larger-scale management, even public management. This too has been recognized in the common law of property. The use of waterways, for example, has been considered a public property right continually since the Romans.

3. *It is easier to define individual property rights in some resources than others.* Land is a resource in which it is relatively easy to define private property rights; it is fixed in location and can be visibly marked. Water is more difficult, since it moves around and cannot be so easily designated as belonging to one person or another. Stocks or wild animals and fish are similar to water, even though individual animals or fish can be taken by individual people. Most difficult of all to “propertize” is air.

4. *Diffusely-enjoyed resources were traditionally the subject of public rights.* The difficulty of defining and enforcing private property rights in air, water and wildlife did not and does not now mean that these resources are not valuable, but simply that they are not necessarily considered *private* property rights. In traditional American law, these diffuse resources were often treated as limited common rights (for example, in the limited use rights common to riverbank owners); sometimes they were designated as “public rights,” reflecting the fact that although a resource could not easily be privatized, it was nevertheless valuable to many people and subject to a kind of easement for public use.³

When people define individual property rights in land, they often use their land as the means of access to adjacent common resources, effectively “piggybacking” the use of common resource like air or water onto their individual landownership. This is not a problem so long as these common resources are relatively plentiful. As with individual property rights, there is no particular need to assert and formalize public rights in common resources, so long as the resources remain plentiful. Thus it does not matter if one landowner disposes of small quantities of wastes in a fast-flowing stream, as long as the water can aerate and biodegrade the wastes. Similarly, no one cares much if a single landowner burns wood or coal, if the amounts of smoke are small and quickly dispersed.

But where population is dense, these unrestricted uses of the “commons” can become a problem. That is why London had restrictions on burning coal as long ago as the 13th century. That is why early 19th century American states restricted access to shellfish in their waters. That is why later 19th-century American law increasingly recognized rights of action for nuisance against landowners who caused undue smoke, fumes, noise, and water pollution—private nuisance in the case of nearby and specially-affected owners, public nuisance where the issue involved the larger public.

5. *Traditional American law recognized public rights as well as private rights.* Traditional Anglo-American law generally recognized a duty for legislatures to compensate owners for private rights that were appropriated for the public benefit. Compensation was and continues to be the norm, for example, when land is taken for roadways, though compensation was contingent on several defenses; compensation was not due, for example, where large numbers of landowners shared more or less equal regulatory burdens, and it was not due when regulation was implicitly recompensed by reciprocal benefits going to the affected landowners. More importantly, compensation was not due when regulation effectively prevented private owners from doing something to which they were not entitled.

Thus traditional American law did not necessarily regard landownership as a license for the unrestricted use of adjacent diffuse resources such as water, air, and wildlife, in situations in which one landowner's use could have serious effects on many other owners and persons. Restraint on such uses was not necessarily a compensable event. One matter for concern was the effect on immediately neighboring

² See T. Anderson & P.J. Hill, *The evolution of Property Rights: A Study of the American West*, 18 J. Law & Econ. 163 (1975).

³ See H. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 Cal. L. Rev. 217 (1984); M. Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789–1920*, 1980 Wisc. L. Rev. at 29–31 (both arguing that 19th-century American law was replete with “public rights,” characterized as property rights).

landowners or other easily identifiable people; but these persons could bring an action on their own. Of more pressing concern were the diffuse and less recognizable general public, whose collective interests might be great even though their individual interests were too small for any of them to bring an action. Massachusetts, for example, required 19th century milldam owners to install rudimentary fish ladders, in an effort to protect both private and public rights in fishing stocks.

These protections of the general public rights were not occasions for compensation. Rather, the public was regarded as the owner of such diffuse resource rights, and a private owner's action was considered an act of unjust appropriation, unless authorized as a net public benefit. Although with growing industrialization, air and water pollution often was authorized (as with municipal sewerage, railroad smoke, and some mining and industrial operations), the usual theory was that any damage to public rights had to be justified by an even greater benefit to the public's wellbeing. This is a continuing feature of nuisance law, in which courts ask whether a use that is otherwise damaging to the public is justified as a net public benefit.

Recent Supreme Court "takings" cases have shown considerable attention to the importance of historic property categories, including the traditional background concept of public nuisance, discussed in the 1992 case *Lucas v. South Carolina Coastal Comm'n*. As *Lucas* makes clear, the mere invocation of "public nuisance" is not an excuse for public appropriation of private property. But traditional "public nuisance" was a catchword for private encroachment and public rights, which were themselves defined by their common and diffuse—but congestible—characteristics.

Moreover, historical American law took into account the need for changes in the protection of public rights; as population increased and knowledge about pollution grew, courts in the later 19th century recognized a wider scope of public rights in connection with air, water, and wildlife protection.⁴ We are much more aware today of the impact of human uses on common environmental resources, but modern environmental laws are the successors to the London prohibitions on coal burning, the early American restrictions on obstructions to waterways, the later 19th century public assertion of responsibility for protecting fish and wildlife stocks, and a whole panoply of public efforts to protect health, safety and welfare from overuse "piggybacked" onto private property.

Thus public rights in traditional American law concerned diffusely-used resources that were valuable but costly to privatize. It would have been wasteful—a tragedy of the commons—to allow individual owners to appropriate resources that were effectively shared by many others, and traditional American law did no such thing.

Parenthetically, the House Bill diverges from this tradition in exempting legislation from takings claims if it protects the interest only of specific and identifiable owners. This is laudable, but by no means exhausts the range of traditional American law. Landowners were not allowed to encroach on public rights either. Economic logic suggests the reasons: identifiable private owners can sue in their own behalf, in private nuisance law, while diffuse members of the general public have much smaller incentives to sue in their own behalf; hence the latter require particular protection. Protection of these resources were all considered a part of the police power rather than takings of private property.

6. *Takings jurisprudence typically occurs in instances of legal transition to the protection of public rights.* So long as public rights are not threatened by private use, there is no need for public authorities to limit private use. If anything, principles of generosity should lead to permissive attitudes about resources that are not endangered. In recognition of this point, many aspects of traditional American law encouraged property owners to be generous in allowing others to use their land. But the quid pro quo was that those using the land acquired no permanent rights to continue indefinitely.⁵

The 1915 case *Hadacheck v. Sebastian* (239 U.S. 394) applied this same idea to public rights: a private brickyard could emit smoke and fumes so long as the surrounding areas were lightly populated, but public authorities could halt the use when the area became more heavily populated, and when the public was actually more threatened by the private encroachments on public rights, in the form of noise and air pollution.

Thus in traditional American takings law, the fact that private owners had "piggybacked" a use of public resources onto their private land uses did not give permanent rights to use diffuse public resources, and past private usage of public re-

⁴For example, Chicago and Cincinnati passed smoke ordinances in 1881; see J. Laitos, *Legal Institutions and Pollution*, 15 *Nat. Resources J.* 423 (1975); for the development of fish and game commissions in the later 19th century, see J.A. Tober, *Who Owns the Wildlife? The Political Economy of Conservation in Nineteenth-Century America* 179-254 (1981).

⁵See, e.g. *Pearsall v. Post*, 20 *Wend.* 111, 135 (N.Y. Sup. Ct. 1838).

sources was not necessarily an impediment to legislation that would protect public resources in the future.

On the other hand, there may be resources to be careful in regulating of existing uses. For one thing, owners may have innocently sunk resources into their land uses, in the expectation of being permitted to continue to consume public resources like air, water, or wildlife stocks; halting a use may result in deadweight loss of those sunk resources. Moreover, the public may be quite late in recognizing that private actions or private land uses cause damage to others and to public resources. Thus considerations comparable to estoppel may sometimes speak for compensating owners to cease their inroads into public resources; but the preservation of the public resources themselves, for all users present and future, speaks for limiting any further private inroads.

7. *The province of takings law is to balance these transition problems.* Takings cases have traditionally deployed several compromises to avoid unfairness, undue burdens, and unforeseeable losses to individual property owners, while at the same time preserving the ability of legislatures to protect public rights.

For example, takings and due process considerations have typically required that pre-existing uses be "grandfathered" into new legislation aimed at protecting public rights. Zoning ordinances, for example, typically exempt pre-existing nonconforming uses, at least for some substantial period of time. Similarly, in state takings jurisprudence, there is much attention to what are called "vested rights" of private property owners. The much-used phrase in federal takings jurisprudence, "investment-backed expectations," aims to identify and if necessary indemnify the property owners who may suffer particular loss, even from legislation that is otherwise a reasonable effort to protect public rights. Besides, early private uses have often not severely damaged such common resources as air, water or wildlife; in economic terms, the marginal costs of early uses may still be still low—unlike the costs of late-comers' additional uses.

These judicial techniques are compromises, or rather, they are all the same compromise. The compromise aims at protecting settled expectations, avoiding the demoralizing of private owners who can establish those settled expectations, and preventing the deadweight loss of pre-existing capital investments taken in good faith. But the other aim of the compromise is to permit legislatures, over time, to adjust the protections necessary for the preservation of public rights and resources, without the need for compensation beyond a point at which owners should reasonably adjust their own expectations.

8. *Takings determinations are a judicial matter.* The judicial compromise just described entails an inquiry—often detailed and fact-laden—into which rights are "vested" or legitimately expected and which are not, and how much damage is unacceptable burden on an existing owner. Such inquiries are necessarily case-by-case, messy though it seems. This is because the conditions of owners' expectations vary enormously, and include questions of timing and conditions of purchase, and other quite individualized questions.

9. *Legislative redefinitions of taking upset the balance implicit in takings jurisprudence.* Some legislative takings proposals would rigidify existing takings claims and defenses, to the detriment of judicial adjustments, over time, of a now rapidly-developing takings jurisprudence. Some add burden-shifting or administrative hurdles that may complicate, but not solve, the fact-specific issues that are very much a part of most takings jurisprudence. To posit at 10 percent or 20 percent or 30 percent diminution in value as a taking still does not answer the question "percent of what?"—a question that necessarily involves quite specific inquiries about a given owner's property and legitimate expectations about that property.

Some proposed bills attempt to resolve this by stating a percentage relating to a portion of the affected property. That seemingly innocuous phrase is an extremely radical position, and goes far beyond any existing takings jurisprudence. Once land can be apportioned into "relevant" portions, any diminution can be manipulated to become a 100 percent diminution. This effectively means that virtually any regulation with any adverse impact on an owner's parcel could become an occasion for compensation, without regard to the owner's expectations and whether they were reasonable.

This goes far beyond the Constitutional protections of private ownership in takings jurisprudence. Indeed, it seriously disrupts the balancing effort of takings jurisprudence—that is, the balance between the protections of private rights and public rights. It illustrates the pitfalls with broad legislative approaches to what are necessarily quite fact-specific inquiries.

Takings cases are typically brought by private property owners, and hence takings jurisprudence normally focuses on the question whether legislatures have been over-

zealous in asserting public rights, to the unfair detriment of particular private owners. Some of the proposed current legislative redefinitions of takings go in the opposite direction, that is, they encourage overzealous assertions of private rights to the unfair detriment of public rights. These redefinitions, if enacted, can result in transfer of public rights to private owners.

10. *Legislative transfers of public rights to private persons have many deleterious effects.* First, such transfers require the public to pay for resources that by rights belong to the public, subject to private claims comparable to estoppel. This is a poor idea in any time, but particularly so in a time when the national deficit is at an all time high.

Second, and alternatively, if the public does not repurchase its rights, such transfers still effectively drain resources away from future generations of American citizens. This is again reminiscent of the deficit problem, insofar as the current generation of children will be impoverished by our present "expenditures" of public rights—that is, their giveaway to private persons, particularly owners of undeveloped land, who have little incentive to maintain those public values.

Third, and most important a pattern of such transfers encourages disrespect for public rights, and encourages private property owners to adopt an attitude of extortion and "in-your-face" about matters of known concern to the public. Property as a whole depends greatly on a civilized respect for the right of others, including the public, and citizens should expect that their legislators will avoid measures that can disrupt respect for public rights, and that could instead reward persons who had no reason to expect that they could indefinitely appropriate public resources for themselves.

11. *Legislatures nevertheless can play an important role in bringing private property concepts into the preservation of public rights.* Legislatures have often used limited property rights to preserve environmental resources. Later nineteenth-century legislatures, for example, charged for the right to hunt and fish through licensing requirements; this gives hunters a limited property right that both gives them security and helps to limit demand on the underlying resources. The 1990 Clean Air Act opened up an extremely valuable quasi-property-rights experiment, with the effective privatization of a large portion of US sulfur dioxide emissions. The tradeable emission rights established under that program, however, are bounded and limited to amounts that, in total, are considered not dangerous to the public health and welfare.

Because they are bounded and finite, emission rights of this sort are quite in keeping with traditional ideas of private property. Legislative approaches like these are very different from measures that would effectively hand over unrestricted rights to encroach on public resources, simply on the basis of ownership of land; under such measures, landownership becomes the basis for "piggybacked" rights to use or damage common resources with impunity. This effectively recreates a tragedy of the commons in the diffuse land-adjacent resources of air, water, and wildlife stocks. Limited tradeable emission rights, by contrast, have the virtues of traditional private property rights: they are bounded in scope; they allow a range of private choices; and they encourage thrift, planning for the future, and attentiveness to the rights of others.

Legislative definitions of this sort—that is, limited private rights in diffuse public resources—could be immensely valuable both for the preservation of public resources and for the security of private ownership. Anyone genuinely interested in securing property rights might well consider how these limited, legislatively created property rights can be deployed to preserve the environmental resources—water, air, wildlife—that so often set off Federal takings disputes.

12. *Conclusion: Public rights are as essential to a free enterprise system as are private rights.* Public rights as well as private rights are essential because the goal of a free enterprise system, all other things being equal, is not to maximize the value of private goods. It is to maximize the value of the *sum of private and public resources*. Much of the literature of the takings debate points out the dangers to private owners from uncompensated public appropriations. These are real; public appropriations can unfairly single out those private owners to pay for public benefits, and writ large, they mean that we could impoverish ourselves as a nation by discouraging enterprise and undermining commerce. That is why we have constitutionalized judicial oversight of public regulation through the takings clause.

But overzealous handouts to private owners are unfair to the public. They too can impoverish us as a nation, by decimating resources that are diffuse and difficult to turn into private property, but that are still immensely valuable to public as a whole, now and (it is to be hoped) the future. The only restraint we have on such handouts is the legislature itself.

The CHAIRMAN. Thank you so much.

Mr. Chaconas, if you can limit yourself to 5 minutes, I would appreciate it.

STATEMENT OF JOHN J. CHACONAS

Mr. CHACONAS. Thank you, Mr. Chairman. I would like to make a quick preface to my testimony and make an acknowledgment to Senator Biden, probably the first politician I had the opportunity to vote for when I was a junior at Delaware.

Senator BIDEN. You just badly hurt yourself with this committee, but thank you.

Mr. CHACONAS. It is just kind of coincidental. I wish in that case that Senator Thurmond was here right now. I voted for him for 14 years after I moved south from Delaware into South Carolina, and I regard him as one of my personal—

Senator BIDEN. I guess it must be the air.

Mr. CHACONAS. It must be the air. I regard him as one of my personal heroes, but I did want to make that acknowledgment.

Senator BIDEN. Thank you.

Mr. CHACONAS. Thank you.

We are going into a dark subject here, but you called it simple, wetlands cases, section 404. We have seen the darker side of it having been a political football, and that is what we are here to talk about.

I offer my deepest and most sincere thanks to the committee chairman and distinguished Senator for the opportunity to speak today. I come here today as a citizen, father, and Navy veteran. I am not affiliated with any environmental organization.

My father taught me that duty, service, and honor to God, family, and America are the ethics to live by. I believe that through good stewardship, the resources entrusted to me by God are as important as the Constitution you and I have sworn to defend and protect. These basic family values give me and my family a deep and abiding faith in God that has sustained us throughout this ordeal.

I own a home and property in Ascension Parish, LA, which has come to symbolize the issues this committee is addressing. This home was built on wetlands, in violation of the Clean Water Act. I have been portrayed as the victim of an unfair law and overzealous bureaucrats, and I want to set the record straight.

We have seen our story and some others that don't pass a simple truth test being used to gain political momentum for the takings issue. Some politicians expose only the tip of the iceberg and what lies below the tip is the underlying question, does existing wetlands policy work and can the public and a critical natural resource remain protected.

Our overwhelming fear is that if takings legislation is successful, it will lead to an emasculation of the Clean Water Act and act as a domino to topple other critical protections afforded by Federal law. This would leave the public to fend for themselves in endless litigation, pitting neighbor against neighbor, brother against brother, and individual against larger and big interests.

I believe wetland regulations can and do work well, with over 99 percent of the permits being applied for approved. As with any pol-

icy, though, there are people who abuse it and use their land in ways that harm neighboring properties. In our situation, over a period of 3 years about 8 acres of wetlands were destroyed. Timber was cleared, a house and road were built, and a pond was excavated, displacing almost 9,000 cubic yards of dirt over a 4-acre area.

As for violations, the EPA only recognizes 2.5 acres out of the 4 acres on our property that were destroyed, and ignores an additional 4 acres of the wetlands on the adjacent piece. For these actions, conducted without permits, the previous property owner has been charged as a willful and flagrant violator by the EPA and the Corps of Engineers. As current owner, I am named as coviolator.

The record is clear that nearly all this property had always been a swamp and that the previous owners had discussed wetlands regulations with the Soil Conservation Service even before they began developing it, but they went ahead anyway. The land was drained, the pond was excavated, and fill was deposited to make what had been a low point in the swamp higher than the adjacent land. The natural water drainage was disturbed, averting water onto land never previously designated as wetlands.

What has happened to the neighbors? As one wrote, each cubic yard of fill displaces a cubic yard of water on my and my neighbor's property. When it rains, another has wetland intrusion around his pecan trees. All these neighbors have declared that their property is devalued as a result of the wetlands destruction where my home now stands. These neighbors went on to say how astonished they were to hear their Congressman is seeking compensation for the violator of this property who sold his rights of ownership to me in December of 1993.

I ask you, then, who are the real victims here. What has happened to our rights and those of our neighbors and other property owners? Should a person who knowingly destroys wetlands be portrayed as an innocent victim and be held up as an example for compensation? I don't think so.

We didn't seek to buy wetlands. We wanted a home and property with a pasture for horses and 4-H livestock for our children. That is what we thought we bought in December of 1993. It appeared to be open pasture, solid, high, dry, flat land, perfect for our plans all around our home. Today, you can't walk 10 feet out the front door without being ankle-deep in water and heavy clay mud.

We have been pawns of the EPA's delay and indecision, and seen our family name used as a political football tossed about on the floor of Congress. In these accounts, the names are accurate, but the rendition lacks the ring of truth. For the past year, the EPA has been the lead agency. To date, it hasn't issued any corrective actions, nor has it initiated any judicial proceedings, and it hasn't responded to most correspondence.

Sources within the EPA cite political pressure favoring the previous owners as the cause for their inaction. Yet, we still count the EPA as our ally because we know the majority of the people in the EPA seek to make the wetlands program work right. The fault here is not wetland policy gone awry; it is the abuse of that policy. A Congressman described this as government arrogance. He is wrong.

The arrogance here is with those who misuse wetlands policy. It is also with those who use our situation to further their agenda.

There is a need for the Clean Water Act and wetlands protections. They should be enforced. If existing policy and regulations had been enforced, I would not need to be here today. Property rights are essential, and like most Americans I believe my property rights do not include harming my neighbor's property. What is wrong here is the arrogant belief that some can do whatever they want with their property and all others be damned. The only remedy left for those neighbors adversely affected is for them to sue one another or to take on the giants of industry and larger interests alone.

If enacted, the Omnibus Property Rights Act of 1995 will do to Louisiana and much of the South what General Sherman and the Federal army could not do. It would force the Government to buy it. I believe the true target of pending legislation and political agendas is to torpedo a wetlands policy that has proven to be workable and flexible.

The day of reckoning is near for responsible government, so don't throw money at problems or offer false hope to homeowners like me or my neighbors, who haven't been offered anything, by the way, when the true beneficiaries will be large land owners, speculators, and developers. People like us are being used as grist for the political mill to spin a story and gain support of a cause that is really meant as a time bomb and a death knell to Federal policy on the Clean Water Act.

Political groups are clearing a pathway whereby large interests will do as they wish, regardless of the consequences for the rest of the public. The Constitution never guaranteed that what we do with our property is a right to harm others or infringe on their right to quiet, peaceful possession.

When I served on a nuclear ballistic missile submarine during the Cold War, we referenced the everpending apocalypse on the doomsday clock. The clock has started ticking again, and if we don't wake up the earth and its resources, as we know it, may not be the same again.

Again, I would like to thank you for the opportunity to speak today. Some people thought this was a forum for us in our civil litigation. This is the Judiciary Committee. I think you can be the judge that my comments were mostly that as a father and an outdoorsman.

I would like to introduce my wife—I should have done that earlier—Cynthia Chaconas. She has been my support and behind me the whole way.

[The prepared statement of Mr. Chaconas follows:]

PREPARED STATEMENT OF JOHN J. CHACONAS

TO THE COMMITTEE: I offer my deepest and most sincere thanks to the Committee Chairman and distinguished Senators for the opportunity to speak today.

I come here today as a citizen, father and Navy veteran. I am not affiliated with any environmental organization. My father taught me that duty, service, and honor to God, family and America are the ethics to live by. I believe that through good stewardship, the resources entrusted to me by God are as important as the constitution you and I have sworn to defend and protect. These basic family values give me

and my family a deep and abiding faith in God that has sustained us throughout this ordeal.

I own a home and property in Ascension Parish, Louisiana which has come to symbolize the issues this committee is investigating. This home was built on wetlands in violation of the Clean Water Act. I have been portrayed as the victim of an unfair law and over zealous bureaucrats. I want to set the record straight. We have cooperated fully with the Corps of Engineers and the EPA for 15 months. We sought the aid of our congressman but instead have become victims of larger interests pursuing their agenda to dismantle wetlands policy through takings legislation.

We have seen our story and others that don't pass a simple "truth test" being used to gain political momentum for the takings issue. Being conservative by nature, and by seeking out the truth, we came to believe that the thought process that generates this legislation tends to disregard the rights of neighboring property owners. Politicians and the media expose only the tip of the iceberg. What lies below the tip is the underlying question: Does existing wetland policies work and can the public and a critical natural resource remain protected?

Our overwhelming, long term fear is that if "takings" is successful it will lead to an emasculation of the Clean Water Act and act as a domino to topple other critical protections afforded by federal law. This would leave the public to defend themselves in endless litigation pitting neighbor against neighbor, brother against brother, and the individual against the larger interests of big business.

The fact is my family and I have been played as pawns by politicians to justify their opposition to current wetlands law. I believe wetlands regulations can and do work well with over 99 percent of the permits applied for being approved. As with any policy though, there are people who abuse it, and use their land in ways that harm neighboring properties.

Let me briefly review the situation involving my land. Over a period of three years, about eight acres of wetlands were destroyed. Timber was cleared, a house and road were built, a pond was excavated, displacing almost 9,000 cubic yards of dirt over four acres. For violation purposes, the EPA only recognizes 2.5 acres out of four acres of destroyed wetlands on my property, and, in turn, they ignore the additional four acres of destroyed wetlands on the adjacent piece.

For these actions, conducted without proper permits, the previous property owner has been charged as a "willful and flagrant" violator by the EPA and the Corps of Engineers. As the current owner, I am named as a co-violator. (See attachment)

The record is clear that nearly all of this property had always been a swamp, and that the previous owners had discussed wetlands regulations with the Soil Conservation Service even before they began developing it. (See attachment)

But they went ahead anyway. The land was drained. A pond was excavated. Fill was deposited to make what had been a low point in the swamp higher than adjacent land. The natural water drainage was disturbed, diverting water onto land never previously designated as wetlands.

And, what has happened to the neighbors? as one wrote, (See attached, Jerry Hanna, ltr dtd 02/20/95) "Each cubic yard of fill displaces a cubic yard of water on my and my neighbor's properties." A second neighbor can't access his property when it rains, and another has water and wetland intrusion around his Pecan Trees. All of these neighbors have declared that their property is devalued as a result of the wetlands destruction where my home now stands. They went on to say how astonished they were to learn that their congressman is seeking compensation for the violator of this property who sold all his rights of ownership in December of 1993.

I ask you then, "Who are the real victims here?". What has happened to our rights and those of the other property owners? Should a person who knowingly destroys wetlands be portrayed as an innocent victim and be held up as an example for compensation.

We didn't seek to buy wetlands. We wanted a home and property with a pasture for horses and 4-H livestock for our children. That's what we thought we bought in December of 1993. It appeared to be open pasture * * * solid, high, dry, flat land * * * perfect for our plans all around our home. Today you can't walk ten feet out our front door without being ankle deep in water and heavy clay mud. We've had frogs stream in through the door and water moccasins swimming by our bedroom windows.

A government hydrologist has told us our property has flooded in the past and will flood again in the future. We watch the approach of every weather system with dread.

We are pawns of EPA delay and indecision and see our family name used as a political football tossed about on the floor of Congress. In these accounts the names are accurate but the rendition lacks the truth. For the past year the EPA has been the lead agency. To date, it hasn't issued any corrective actions, nor has it initiated

any judicial proceedings and it hasn't responded to most correspondence. Sources within the agency cite political pressure favoring the previous owners as the cause for EPA's delay.

On the other hand, representatives from the U.S. Corps of Engineers have been true gentlemen from the outset showing concern for us, the neighbors, and the environment. The same can be said for EPA scientists.

The fault here is not wetland policy it is the abuse of that policy. I heard a Congressman describe this as government arrogance. He's wrong! The arrogance here is with those who misuse wetlands policy. It is also with those who use our situation to further their agenda. There is a need for clean water act wetlands protections. They should be enforced. If existing policy and regulations had been enforced I would not need to be here today.

Property rights are essential. Like most Americans I believe my property rights do not extend to harming the property of my neighbors. What is wrong here is not wetland policy gone awry, but the arrogant belief that some can do whatever they want with their property and all others be damned. The only remedy left for those neighbors adversely affected is for them to sue one another or take on the giants of industry and larger interests alone.

If enacted, the Omnibus Property Rights Act of 1995 will do to Louisiana and much of the south what General Sherman and the federal army could not do. It would force the Government to buy it. Common sense tells us that government can't afford to buy all that will be devalued.

I believe the true target of pending legislation and political agendas is to torpedo a wetlands policy that has proven to be workable and flexible.

The day of reckoning is near for responsible government. Don't throw money at problems or offer false hope to homeowners when the true beneficiaries will be large land owners, speculators and developers.

People like me are being used as grist for the political mill, to spin a story, to gain support of a cause that is really meant as a time bomb...a death knell to federal policy on the Clean Water Act. Political groups are clearing a pathway whereby large interests will do as they wish regardless of the consequences for the rest of us. The Constitution never guaranteed that what we do with our property is a right to harm others or infringe on their rights to quiet, peaceful possession.

When I served on a nuclear ballistic missile submarine during the cold war we referenced the ever pending apocalypse on the "doomsday clock". The doomsday clock has started ticking again and if we don't wake up the earth and it's resources, as you know it, may not be the same again.

Respectfully submitted,

JOHN J. CHACONAS, JR.

CYNTHIA L. CHACONAS.

ATTACHMENTS

Soil Conservation Service field Notes

COE Wetland Determination

Edwin W. Edwards—Governor of LA, 2-ltrs dtd 7/12/94

EPA internal memorandum faxed 08/23/94

John Breaux—Senator, Ltr dtd 09/16/94

Robert Perciasepe—Asst. Administrator, EPA ltr dtd 08/31/94

Kenneth H. Clow, Col. U.S. Army, COE ltr dtd 08/22/94

J. Chaconas, ltr dtd 09/23/94

Annette Sharp—LA Governor's Chief of Staff, ltr dtd 9/27/94

W.E. Tickner—Chief Eng. Div., COE Memo dtd 10/07/94

Neighbor's Witness Statements (9) to EPA, 10/94

J. Chaconas, ltr dtd 11/4/94

J. Chaconas, ltr dtd 01/07/95

Jerry Hanna, ltr dtd 02/20/95

Congressional Record, dtd 03/02/95 Tauzin Speech

House Resources Committee, ltr dtd 03/08/95

Paul Suir, ltr dtd 03/09/95

Jerry Hanna, ltr dtd 03/10/95

Danny Hanna, ltr 03/10/95

Paul Suir, ltr dtd 03/13/95

Suir, Hanna, Hanna, ltr 03/29/95

[EDITOR'S NOTE: The above mentioned attachments retained in committee files.]

[Letters submitted by Representative Billy Tauzin follow:]

REPRESENTATIVE BILLY TAUZIN,
Third District, LA.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, DC.

DEAR SEN. HATCH: It has come to my attention that certain remarks may be made about me at today's hearing of the Senate Judiciary Committee.

I respectfully request that you hold the record open so I may have an opportunity to respond.

With warmest personal regards, I am
Very truly yours,

BILLY TAUZIN,
Member of Congress.

ROGER AND SHARON GAUTREAU,
April 5, 1995.

Hon. ORRIN HATCH,
Chairman, Judiciary Committee,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: What hypocrisy! Mr. and Mrs. John Chaconas and their environmental friends claimed foul when Mr. Chaconas was not allowed to testify at a Wetlands Task Force hearing on March 13, 1995, in Belle Chasse, Louisiana.

He claimed that he was being "muzzled." In reality, he was probably not allowed to testify for the same reason we were not allowed. Because his allegations are part of civil litigation currently under the jurisdiction of the 23rd Judicial District Court for the State of Louisiana.

We bitterly resent that he is being allowed an opportunity to tell his side of the story in an obvious attempt to gain public sympathy for his case.

What about us? We are victims, too. In fact, we stand to lose even more than he does. Why weren't we given an opportunity to present our side?

Because this case is under litigation, we are not going to get into specific issues. However, we do want to set the record straight. Regardless of what Mr. and Mrs. Chaconas say, this truly is a "horror story." It pits neighbor against neighbor; it involves numerous federal agencies and conflicting rules and regulations; it has cost the taxpayers thousands of dollars to enforce and defend these unfair regulations; it has cost us, as individuals thousands of dollars in legal fees; and, worst of all, it has made a shamble of our lives.

It is truly astonishing that after all the assistance the Chaconas received from Congressman Tauzin in an attempt to resolve that matter with the federal agencies involved, that they now claimed that he misrepresented them. Nothing could be further from the truth. He has spent an inordinate amount of time and energy trying to help both our family and the Chaconas family. He has personally visited with both families. He has offered to help us obtain pro bono counsel in our case and made countless phone calls on our behalf.

Now they have gone on the attack against Congressman Tauzin. Why? It is obvious to us the reason is because they are acutely aware of the effect the proposed legislation by Congressman Tauzin will have on their law suit against us.

We are middle-class, hard-working American taxpayers, the kind of people Billy Tauzin is trying to represent. We are not real estate developers, nor land speculators. We only own the land on which our home is located. Now, according to the federal government, we may not even own our land.

To the best of our knowledge, Representative Tauzin has succeeded in representing both families fairly. He made it clear to us that he could not, and would not, take sides in our civil case. But he would, and has, championed both of our cases against the federal government. Congressman Tauzin has repeatedly stated that both of our families are victims of well intentioned but misguided federal policies which have created terrible conflicts.

He is absolutely right! So why weren't we asked to testify tomorrow? Why weren't we allowed to testify at the Louisiana Congressional hearing? Why did NBC spend hours interviewing the Chaconas and not us? Why did the Washington Post interview the Chaconas but not us?

Sadly, we fear the reason is this: A constituent who attacks his Congressman makes the Nightly News. But the Congressman who champions the cause of his constituents does not. What a tragedy * * * what hypocrisy!

Respectfully submitted,

ROGER AND SHARON GAUTREAU.

The CHAIRMAN. Thank you, Mr. Chaconas. We are happy to have you before the committee, and we have been happy to have both of you before the committee.

We will keep the record open for statements of other Members of Congress, and others as well, because we would like to have as much public input as we can on this issue. Believe it or not, I think the desire on both sides is to do what is best under the circumstances here, and I am convinced that we have to do something about the out-of-control Federal regulations in our society and the, I think, inappropriate takings that go all over our society against people like Nellie Edwards, who testified today, and in some way yourself and others.

To make a long story short, we appreciate your being here.

Senator Biden, we will end with you.

Senator BIDEN. Thank you very much. I think you both are an example of the other side of the equation that is never talked about. The reason why we have these laws in the first place—and no one is suggesting that regulators don't overregulate sometimes and that bureaucrats don't abuse, but your case is pretty clear, it seems to me.

Assume you hadn't even purchased the property; if you had been an adjacent property owner, the ability of that developer to use the wetlands the way he did would have caused you damage and caused your neighbors damage. I think we all kind of forget the reason why we pass these laws in the first place. It is not because property owners said, you know, we are not going to pollute, we don't want to do that, we will self-regulate ourselves, we are not going to do these bad things.

Having said that, professor, I would like to ask you a question. You gave a very articulate statement laying out how we have historically viewed public and private property, and how they intersect, but let me ask you about this legislation. Are you for it or against it?

Ms. ROSE. I don't think it is a good idea. I think it disrupts takings jurisprudence as it is, which I think is necessarily fact-specific, case by case.

Senator BIDEN. So you are against it?

Ms. ROSE. Yes.

Senator BIDEN. Secondly, you were in the room when I was asking my questions about whether or not this legislation would affect some of the hypotheticals that I raised. Have you read the legislation?

Ms. ROSE. I have, but I haven't had a chance to look as closely as some of the other witnesses here who were working on it all along.

Senator BIDEN. Do you believe that—and if you don't have enough knowledge to make the judgment now, I would like you to submit an answer to this in writing. Where a Federal agency, like the Food and Drug Administration, refused to allow a product to be marketed, would this constitute the cost to that individual com-

pany—if it exceeded a third of its value, would it constitute a private property that had been taken for purposes of this legislation?

Ms. ROSE. Senator, I don't know enough about the Food and Drug Administration to be able to speak to that. I could speak, though, to the other hypothetical that you were raising in that connection, and that was the imposition of effluent limitations on plants.

I think the way that litigation would work would be the following. Effluent limitations cost the plant something; every year, they cost the plant something. That means that that plant has annual costs that it did not have before. It makes the total value of that plant property less when you think of the total value of the property as being a stream of income over time. There are now more expenditures that must be taken every year.

If those expenditures amount to a third—also, I should say the portion stuff can be manipulated quite a lot, as you were suggesting earlier in some of your questions, but if those additional costs amount to a loss in the stream of income that then would take the value of the capital plant down by a third, then I think that you are going to see lots of litigation and I suspect that is what would happen. I was interested that the previous panel did not regard that as likely to happen. It seems to me extremely likely to happen.

Senator BIDEN. They went beyond that. They said it wasn't property; it didn't fit the definition of property.

Ms. ROSE. I was also interested to see that, and my own view about this legislation is that it expands the view of what is private property and diminishes the view of public rights. It is implicit in the lack of defenses that are here for publics asserting the ability to protect public rights.

Senator BIDEN. Professor, does this legislation, as you understand it, apply to that cost that the regulation requires a property owner to expend in order to be able to continue to use the property?

Ms. ROSE. I am sorry. I missed the first part of the question.

Senator BIDEN. If a regulation requires a property owner to expend money to be able to legally continue to use the property as they have been using it, is that property? Does that constitute property, the expenditure of capital? Is that capital property?

Ms. ROSE. Well, what happens is that a land owner or anybody, any owner, would have to spend money, say, annually, and that means that the value of the underlying asset diminishes, so you can turn the property into that asset. If you have got to spend more to keep up a farm, for example, it means your annual profits are less and the total value of the farm is less. Those are the instances where I think we are likely to see litigation that property has been taken.

Senator BIDEN. I have one more question and then I will submit the rest of my questions in writing. If this bill allows a court, which it does, as I understand it, to invalidate a law Congress passes, and as I understand the legislation—my chief counsel is trying to find it for me and I want to get the exact language.

If this bill allows a court to invalidate a law Congress passes, doesn't that mean judges can override the judgment that the Congress makes about public health and safety, and may reasonably limit the highest value of that property use?

Let me just read it to you here. It says, "Jurisdiction and Judicial Review. A property owner may file a civil action under this act to challenge the validity of any agency action that adversely affects the owner's interest private property in either the U.S. District Court or the U.S. Court of Federal Claims. This section constitutes express waiver of the sovereign immunity of the United States. Notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, each court shall have concurrent jurisdiction over both claims of monetary relief and claims seeking invalidation of any act of Congress or any regulation of an agency as defined under this act affecting private property rights. The plaintiff shall have the election of the court in which to file a claim for relief."

Is that unusual?

Ms. ROSE. Well, Senator, this is an area of Federal jurisdiction that I don't know entirely well, but it does seem to me that one would think about some of these considerations. Courts do invalidate statutes of Congress from time to time. The difference here is that the constitutional provision that is under consideration is the Takings Clause, and that clause provides for just compensation if there has been a taking.

I think there are many, many issues about what constitutes a taking, and I think that those are best dealt with by courts. Nevertheless, once having found a taking, the remedy is just compensation, rather than invalidation of a statute. In part, the reason for that is that a statute might be invalid with respect to a particular property, but you wouldn't want to knock out the whole regulatory scheme because there has been some overreaching on that particular property.

Senator BIDEN. So isn't this an unusual or additional or an unintended grant of authority—not unintended—to the courts to allow them under takings jurisprudence to invalidate a statute?

Ms. ROSE. It seems unusual to me. It seems that this is a very heavy cannon to apply when the instances of takings are so individual and so much questions of site-by-site specific applications of statutes.

Senator BIDEN. I don't have any further questions, Mr. Chairman. I thank the witnesses, and with your permission, I would like to be able to submit some questions in writing.

I think, Mr. Chaconas, you made an incredibly articulate statement for the proposition which you are positing, which is that this is a two-way street.

Mr. CHACONAS. Thank you, sir.

[The questions of Senator Biden are located in the appendix.]

The CHAIRMAN. Thank you, Senator Biden.

We wanted to thank all witnesses for being here today. We think it has been a good hearing and we appreciate your being here.

We have a statement from Senator Abraham which we will include in the record.

[The prepared statement of Senator Abraham follows:]

PREPARED STATEMENT OF SENATOR SPENCER ABRAHAM

Mr. Chairman, I want to express my strong support of the "Omnibus Property Rights Act" introduced by my distinguished colleague, the Senator from Kansas. I

believe this bill will address a significant problem affecting the economic and personal freedom of too many Americans.

Unfortunately, under the Supreme Court's current, restrictive interpretation of the Takings Clause of the Fifth Amendment, a property owner whose land value has been diminished by a use restriction usually cannot receive compensation unless the restriction has rendered his property valueless. As a result, virtually no substantive or even procedural obstacles hinder unelected bureaucrats from imposing economically devastating use restrictions on private land.

The Omnibus Property Rights Act solves this problem by providing that a landowner shall receive full compensation whenever federal government action directly reduces the value of his land by one-third or more. The "directly" qualifier precludes compensation for "consequential damages," such as those suffered by the owner of a gas station on a rural two-lane highway when a parallel superhighway is built nearby.

The Act also requires agencies to conduct a "takings impact analysis" before imposing a regulation "which is likely to result in a taking of private property," thus forcing regulators to consider the consequences of the regulations they propose. In this way the bill will protect Americans from unnecessary regulations that inhibit their full use of their own, private property, and see to it that necessary regulations that take away significant use and value from this land are accompanied by proper compensation.

Mr. Chairman, I feel it necessary in expressing my support for this bill to confront certain myths currently being bandied about concerning our attempt to see that regulatory takings are accompanied by proper compensation.

The first myth is that the Act would create a new "entitlement." This myth should sway no one because obviously a property owner who is compensated for losses caused by the federal government is different in kind from the person who simply receives a government handout.

The second myth is that the Act would increase the deficit. Again, there is no basis for this view. CBO has scored the Act as revenue neutral, largely because any compensation awarded under the Act must be paid out of the operating budget of the agency that imposed the regulation and not out of any fund set up specifically to cover judgment awards.

The third myth is that the Act will require compensation for polluters and others who engage in noxious uses of their property. I am happy to say that this myth also is without foundation because the Act expressly provides that no compensation is required if the restricted use is a nuisance under the common law of the State in which the property is located. Since such use rights do not inhere in the owner's title to begin with (as they are not recognized at common law) restrictions on such uses do not impinge on the property owner's rights.

One final myth I would like to address is the claim that the Act is "anti-environment." Mr. Chairman, the Act does not ban environmental regulation. Indeed the issue raised by property rights legislation is not whether a clean environment, preservation of pristine wilderness and so on are worthy goals. Instead the issue is whether the burdens associated with those societal benefits shall be borne by a few unlucky landowners or by society, through its government. Simple justice demands that society pay for societal benefits.

Mr. Chairman, none of these myths match reality because the "Omnibus Property Rights Act" aims only to protect the well-grounded rights of property owners. If we are serious about protecting the liberties of the American people against governmental intrusion we must enact laws that effectively protect them from that intrusion. This bill will do exactly that and in a measured, reasonable manner.

The CHAIRMAN. With that, we will recess until further notice.
[Whereupon, at 1:55 p.m., the committee was adjourned.]

THE OMNIBUS PROPERTY RIGHTS ACT OF 1995: HOW DOES IT HELP UTAHNS?

MONDAY, JULY 3, 1995

**U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SALT LAKE CITY, UT.**

The committee met, pursuant to notice, at 10:15 a.m., in room 303, Utah State Capitol, Salt Lake City, UT, Hon. Orrin G. Hatch (chairman of the committee), presiding.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. Today we will consider private property, specifically the unjust seizures of private property. Make no mistake. This hearing is not a hearing on the importance of safeguarding the environment, which I—which I do support. Nor is it about legitimately protecting wilderness areas, which I also support. Nor is this hearing about the sometimes necessary condemnation of certain private properties to benefit the common good in the building of necessary highways and schools, which are routinely compensated. What this hearing involves is the uncompensated taking of private property that has, in some cases, been in families for generations, takings by Federal regulations.

Tomorrow is the Fourth of July. It's America's Independence Day. Our forebearers fought a revolution to protect certain liberties that they felt were founded not on the ruler's largesse, but on a higher law. In order to ensure that those basic rights would never be infringed, the Founders enshrined them in the Bill of Rights. One of those rights was written into the fifth amendment which says, "* * * nor shall private property be taken for public use without just compensation." The fight to maintain that right goes on in our society.

A well-intentioned desire on the part of Federal regulators to protect a wide variety of interests has led to a dramatic increase in the amount of private property that is effectively taken by devaluation. To be clear, not every Federal regulation amounts to a taking. Furthermore, some regulations which infringe on property rights are worthwhile. However, when a regulation does have the effect of taking private property, the owner of that property should receive just compensation. Anything less is a violation of a basic liberty heralded in the Constitution and specifically written in the Constitution. Frankly, I find it hard to believe that some people claim that compensating Americans for a government taking is such a novel concept. After all, no one disputes the laws that pro-

vide financial compensation when a person's land is condemned for a highway. The same principles should apply when land is drastically devalued when Federal bureaucrats declare it a wetland.

In order to correct this infringement on the rights of the citizens of Utah, I have worked with Senator Dole, Senator Bennett and several other Members of Congress to produce the Omnibus Property Rights Act of 1995. This bill requires that when the Federal Government commits a taking of property, that it compensate the owner of the property.

The Omnibus Property Rights Act contains several features which combine to protect private property in a responsible and reasonable manner. The bill is faithful to existing Supreme Court rulings. Title II of the bill codifies and clarifies the area of takings law and court jurisdiction to enable the property owner to vindicate his or her rights. Title IV requires that all Federal agencies examine proposed regulations to assess the "takings impact," of those regulations. Title V creates a streamlined administrative remedy for claims arising under the much maligned Endangered Species Act and the wetlands provision of the Clean Water Act. This will help to avoid costly litigation. Lastly, and perhaps most importantly, all awards or settlements for takings claims will be paid out of agency budgets.

All these provisions will combine to achieve remarkable results. Not only will Utah property owners be equipped to defend themselves, but the Federal Government will benefit from this bill as well. By forcing the agencies to consider the costs of their takings, the agencies will steer away from unwarranted regulation. The clarifications in the law will permit both the agency and the property owner to more accurately determine what will be considered before taking—or considered a taking before any litigation is necessary. Indeed, my bill may actually decrease litigation in this area of the law. Finally, by imposing the cost of the agency's action on the—on the agency and not on innocent individual property owners, the agency will be certain to achieve its statutory goals with as little taking of private property as possible. This is long overdue, in my opinion.

In closing, this bill simply protects the rights guaranteed to all Americans by the expressed language of the fifth amendment. It does so fairly, reasonably, and in a way which allows us to protect the environment, as well as public health and safety.

So I welcome all of you here today. I look forward to hearing the testimony of our witnesses and look forward to moving ahead.

[Senator Hatch submitted the following material:]

THE OMNIBUS PROPERTY RIGHTS ACT OF 1995—A SUMMARY

TITLE I—FINDINGS AND PURPOSES

Section 101. Findings. A statement of the current problem of extensive regulatory takings.

Section 102. Purpose. How the bill will resolve those problems.

TITLE II—PROPERTY RIGHTS LITIGATION RELIEF

Section 201. Findings. A statement of the obstacles facing property owners who are trying to vindicate their rights.

Section 202. Purposes. How Title II will remove those obstacles.

Section 203. Definitions. Defines property to include real property, water rights, contract rights, rents, interests defined as property by state law, and other interests understood as property rights under common law.

Section 204. Compensation for Taken Property. This section sets forth the elements of a takings claim. In setting the legal framework, Supreme Court precedent is heavily relied upon. The area partial takings, which is unclear is clarified with a bright line standard, requiring compensation for losses over 33 percent. No compensation is required where the regulation prevents nuisance.

Section 205. Jurisdiction and Judicial Review. This section establishes concurrent jurisdiction for takings claims in both the federal District Courts and the U.S. Court of Federal Claims.

Section 206. Statute of Limitations. Claims must be brought within six years of the date of the taking.

Section 207. Attorney's Fees and Costs. Any prevailing plaintiff is also awarded the costs of litigation.

Section 208. Rules of Construction. Nothing in this bill prevents the States from creating additional property rights.

Section 209. Effective Date. The provisions of the bill take effect immediately upon enactment.

TITLE III—ALTERNATIVE DISPUTE RESOLUTION

Section 301. Alternative Dispute Resolution. Arbitration of takings disputes is available as an alternative to litigation.

TITLE IV—PRIVATE PROPERTY TAKING IMPACT ANALYSIS

Section 401. Findings and Purpose. A statement of policy that the government should avoid takings wherever possible.

Section 402. Definitions. Defines the terms used in this title.

Section 403. Private Property Taking Impact Analysis. Requires agencies to conduct a Takings impact Analysis for regulations which are likely to result in the taking of private property.

Section 404. Decisional Criteria and Agency Compliance. Agencies shall not issue rules which require an uncompensated taking.

Section 405. Rules of Construction. Nothing in this bill requires exhaustion of administrative remedies nor does anything in this bill act as a determination of property values.

Section 406. Statute of Limitations. Suits must be filed within six years of the submission of a Takings impact Analysis.

TITLE V—PRIVATE PROPERTY OWNERS BILL OF RIGHTS

Section 501. Findings and Purpose. A recognition of takings committed by the Clean Water and Endangered Species Acts.

Section 502. Definitions. Defines the terms used in this title.

Section 503. Protection of Property Rights. Agencies must develop rules to protect the rights of private property owners.

Section 504. Property Owner Consent for Entry. Agencies may not enter private property without the consent of the owner.

Section 505. Right to Review and Dispute Data Collected from Private Property. An agency may not use data collected on private property without the owner having been given access to the data and an opportunity to dispute its accuracy.

Section 506. Right to an Administrative Appeal of Wetlands Decisions. Creates an administrative appeal of a determination that land is a wetland or a denial of a permit to fill.

Section 507. Right to Administrative Appeal Under the Endangered Species Act of 1973. Provides for an administrative appeal by property owners of a determination that their land is a critical habitat or denial of a permit for an incidental take.

Section 508. Compensation for Taking of Private Property. Action under either of these acts which satisfies the criteria of section 204 of this act is a taking, requiring compensation.

Section 509. Private Property Owner Participation in Cooperative Agreements. Requires the agency to notify property owners whose land is subject to an Endangered Species management agreement.

Section 510. Election of Remedies. Property owners retain the right to preserve all other remedies.

TITLE VI—MISCELLANEOUS

Section 601. Severability. If any part of this act is held unconstitutional, the remainder shall not be affected.

Section 602. Effective Date. The bill takes effect on enactment.

Our first panel this morning will consist of Mrs. Nellie Edwards from Provo, UT; Mr. Larry Gardner from St. George, UT; and Mr. Edward D. Smith from Centerville, UT. So we would ask you to take the three chairs up there, if you will, the three of you. I'm happy to welcome all of you here this morning and we look forward to taking your testimony.

Nellie Edwards is a property owner from Provo. Her land was condemned by the city as part of the airport expansion project. However, she only received a small fraction of the land's actual value because her land had been designated a wetland by the Corps of Engineers. So welcome Mrs. Edwards, we're happy to have you here.

Larry Gardner, I will introduce Larry after Mrs. Edwards finishes her testimony, so let's begin with you.

PANEL CONSISTING OF NELLIE EDWARDS, PROVO, UT; LARRY GARDNER, ST. GEORGE, UT; AND EDWARD D. SMITH, CENTERVILLE, UT

STATEMENT OF NELLIE EDWARDS

Mrs. EDWARDS. Thank you, Senator Hatch. I'm pleased to be here this day and I would really like to take just a few moments to thank you for your love and kindness and the—how good you've been to me and what—tell you what a wonderful staff I think you have

The CHAIRMAN. I think we need to pull those mikes a little closer.

Mrs. EDWARDS. I wanted to tell you how grateful I am for the love and kindness you've shown to my family and I, and tell you that I've never worked with a more wonderful staff than what you have working with you.

The CHAIRMAN. Thank you so much.

Mrs. EDWARDS. My name is Nellie Edwards and I'm from Provo, UT. My husband, Phil Edwards, and I have been ranchers for many years. Our farm is located on the east shore of Utah Lake and borders the Provo River as it flows into Utah Lake. We have been property owners in Utah for 50 years.

Three years ago my husband passed away. Shortly thereafter I was informed that my land had been condemned by Provo City. This land was to be used for my retirement, but instead I was told they planned to use my land to enlarge an existing extremely profitable campground near the lake. I didn't have much choice in the matter because the laws were clearly on their side. Today I walk down on the land and see the mobile trailer hookups.

Just before my husband passed away he told me to protect this lakefront property because of its prime location and to not let anyone take it away from me. I have taken this latest condemnation particularly hard because this is the third time that the Government has condemned property which belonged to this family.

In 1938, my husband and his brother owned a large dairy farm in Charleston, UT. The Government condemned this farm for the building of Deer Creek Reservoir. They took possession of the property giving very little compensation to them. Three days later as Phil and his brother rode across their land to get to their cattle, they were told by a local sheepherder that they were trespassing and that he had leased the land from the Government. At this time the first condemnation took place my husband was only 19 or 20 years old. He and his brother tried to fight for their land, but of course they lost in court.

In 1973, my family lost its land to the Government again. That property included our feed yard, a nice shed, a flowing well and good protection for our cattle. Even though we did not want to sell the property, we reached an agreement to sell it for \$7,500 an acre, and this was a fair price. Since then it has become one of the State's most profitable campgrounds.

Now we find ourselves in the position of having our land taken for the third time. This time the intimidation used by these people has been very difficult because I have not had Phil to help me fight this battle. I have only asked for fair market value for my land and been told that my land was now valueless because it had been appraised as wetland, even though we had never been notified by the Corps of Engineers, nor anyone else. When I voiced my opinion that I was unable to understand how a wetland could be used for a recreational vehicle park, I was told that if I did not accept their offer, they could challenge my title to the land itself.

I have since learned that the city was able to acquire my property at \$600 an acre because 27 of the 35½ acres have been appraised as wetlands. Before at least the State gave us a fair price when they condemned our land. At this time my property is now being developed into an \$800,000 campground, which is nearing completion. This campground will accommodate over 60 recreational vehicles per night and has excellent potential for profit.

I have continued to ask how one government agency like Provo City can condemn my property and then trade it to the State of Utah. I don't understand why my land was considered worthless when I owned it, and now that it has been condemned as wetland, an expensive campground can be built on it.

I did not want to sell my land and I have been denied the opportunity of selling it for future development myself. My biggest fear, however, is that if these agencies are allowed to take this valuable recreation property at these low ball prices, they will come back and try to take the rest of my property for similar values.

I have always worked very hard to be independent. And this land was supposed to support me and my husband in our retirement years. We did not have the benefits of working for a company which would provide us with a pension. Our land is my security, and much of that security is gone just when I need it the most.

The CHAIRMAN. Thank you, Mrs. Edwards. We appreciate your testimony here today. And I'll have a few questions for you in just a few minutes.

Let me turn to Mr. Larry Gardner from St. George. He owns land which has been rendered valueless because it is a habitat of the endangered desert tortoise. He is willing to exchange his land

for nonhabitat land of equal value, but the Government will not trade with him based upon—trade with him because the Government wants the land's original value to be the value that they work with. So Mr. Gardner, we'll turn the time over to you.

STATEMENT OF LARRY GARDNER

Mr. GARDNER. Well, thank you, Senator, it's a privilege to be here today and I appreciate the opportunity.

My family has been in St. George since its founding in 1862. I will skip through some of the narrative of my written comments so I might stay within the timeframe, so please excuse me if it sounds a little bit abrupt in places. I would like to commend you very much for your aggressive leadership, though, in this vital area, very critically needed at this time.

The proposed Omnibus Property Rights Act is not just important, it is absolutely essential. Particularly in the wake of the recent Supreme Court decision concerning the designation of critical habitat for the endangered species on private property.

It is important that we understand a person's net worth is a general composite of all of his assets. Assets of course can be anything of value, that is, the number of dollars you have, the value of the house you live in, the car you drive, the stocks and bonds in your investment portfolio, as well as the amount of real estate you own. The protection of all of that property is what the fifth amendment is all about.

Most people in America would not tolerate a thief stealing your money from a bank, nor would they allow an arsonist to set fire to your home, or a computer whiz to defraud your stocks and bonds. Why then do we look the other way or even shout approval when the Government makes paupers out of people by stealing equity from private property holders.

Nobody would debate the need for occasional government condemnation. Most understand how the fifth amendment protects citizens in that process. Unfortunately, we have reached the point in America where the Government, the protector of the people, is now using circuitous and devious means to avoid that process and is destroying the financial well being of many of its citizens. By using regulations, policies, legislative acts and ensuing procedures of implementation, the Government, through inverse condemnation, is obtaining private property without just compensation to that individual. They may not end up with clear title of ownership, but by being able to tell you what you can and can't do with your property, they have total control without ownership and it hasn't cost them a dime. Thus inverse condemnation.

A classic example of that is the way the Endangered Species Act impacts private property. I support protection for and conservation of most animal and plant life, but not at the expense or denial of personal property rights of man guaranteed under the Constitution. The conservation philosophies of the Endangered Species Act is acceptable, but I do not agree with the hidden agendas of certain environmentalists or agencies who seek to control private property and all public lands under the guise of this law.

Under the Endangered Species Act, huge penalties are levied for the destruction of any of the listed species or their habitat. Orig-

nally it was thought of in terms of protecting the bald eagle or grizzly on public lands. But with the present listing of everything imaginable, including every subspecies, almost every rat, fish, snail or weed can qualify. With the hundreds of varieties now listed, the thousands—and the thousands that are candidates to be listed, one can find few areas in the United States that are not impacted by the far reaching tentacles of the Endangered Species Act.

It use to be a 29 cents stamp was all that was required to abort justice by the fighting of a frivolous lawsuit. Today it is a 32 cent stamp and a request to list a plant or animal on your property as endangered and you can kiss your equity goodbye.

The listing of the desert tortoise as threatened has had a tremendous impact on my family's equity as well as many others in our area.

Among other properties, our family owns approximately 1,200 acres just to the north of St. George. At the approximate time of the listing of the tortoise, we were seeking some financing and were anxious that we might either sell part of our land or use it for collateral for a loan. We therefore sought an appraisal. To our surprise, none of the appraisers that we talked to were willing to touch it. Their common statement was, "if it's got turtles on it, it isn't worth anything because you can't do anything with it."

That was a little difficult for us to accept because the adjoining land that we had previously sold was now developed into lots and selling for over \$30,000 a lot. Not only did the value of the rest of our property become negligible, but the buyers disappeared as well, and the lending institutions shied at our collateral. By calling our land critical habitat, the Fish and Wildlife Service had reduced our multimillion dollar equity to pennies declaring it fit only for a turtle park.

The government goes the extra mile to bring a blue collar thief to justice, spends thousands to catch the more sophisticated white collar criminal, but it has jumped into bed with the "green collar" rapist to take advantage of the innocent and defenseless private property holder.

Trying to rectify this problem has been an interesting experience to say the least, because a good portion of Washington County was identified as suitable tortoise habitat, our county commissioners tried to be proactive in solving this problem by requesting a section 10, which under the Endangered Species Act allows for the setting aside of critical habitat as a type of preserve in order that other habitat areas in the county might be released for other uses. That process has been going on now for over 4 years with debate after debate as to what is critical habitat and what isn't. What needs to be protected and what doesn't. During all of this process, the Fish and Wildlife Service has held everyone hostage. Their arrogant attitude and gestapo approach has been criminal in my mind. Time after time, when all the committee came to the table in good faith, with the spirit of compromise, the Fish and Wildlife Service hedged, extended deadlines, and made more ambitious and greedy demands. It became very obvious from the various debates that the science community could not agree upon the facts because they had no hard science, just a lot of supposition. The Fish and Wildlife Service was of the opinion that they had full latitude of the "May

Affect Clause" in "The Act," and used threatening letters and section 7 denials as extra clout.

The most conclusive evidence that seemed to surface indicated that maybe the tortoise never should have been listed in the first place, but the Wildlife Service were running rough shod and rampant because they were untouchable. They could not be held to any degree of accountability in the whole process, therefore, they were making decisions based on pseudo science with blatant disregard to the financial impact on property holders or the county. What did it matter to them if their conclusions were wrong? It was no financial loss to them. No skin off their nose. Green collar theft at its finest. In the meantime, who bears the financial impact? The private property owner is the guinea pig in this whole experiment, the only one left holding the bag. But unfortunately, the bag is now empty.

Case in point. Our property was originally listed as high density habitat which means up to 400 turtles per acre. Excuse me, 400 tortoises per section. Because we strongly contested that designation, the BLM and Fish and Wildlife Service agreed to walk it with us. On 2 different days, seven of us walked the portion of our property that was designated as the prime portion of the critical habitat. After walking about 40 acres in grids, we found, to their chagrin, a total of one piece of scat, one shell of a dead tortoise, one den, and only one live tortoise. They simply did not have the scientific evidence to justify their designation. Fortunately for us, that portion of our property was not included in the final map of the recovery plan as being critical habitat. We still, however, have 240 acres listed in the middle of a proposed habitat conservation plan, but others have even more.

For good or for worse, the HCP is still on course with possible implementation this fall, but it hinges on several things happening. One of which is the super exchange which calls for all of the property holders within the boundaries of the HCP to be traded for BLM properties in other areas that don't have endangered species on them. Whether that will happen or not remains to be seen.

One of the challenges that is still facing this exchange is the value that is being placed on the lands to be traded. We agreed to trade value for value. The original agreement was that in order to facilitate the implementation of the HCP, the appraisers would treat the land as if there were no tortoises present. Even though that was agreed upon, that opinion has flip flopped several times and is still presently being debated. The third approved appraisal is now being made of our property. With the tortoise on our land, we are told it is worth approximately \$200 to \$300 an acre. Because confidential negotiations are continuing, I am not at liberty to say what the high appraisal is on our land, but without the presence of the tortoise, let it suffice to say, the difference in equity between the high and the low on these few acres is over \$2 million. The difference for some of the neighbors would be ten times that much. Are we expected to donate that equity in the name of patriotism or just because we like to think of ourselves as good philanthropic citizens? Maybe so, but if so, it ought to be by choice.

My above example is only one little portion of an ongoing discussion, seeking for some sort of resolution. There are many others in

this county and tens of thousands of property holders throughout the Nation that are in similar circumstances. By one stroke of a pen, the Fish and Wildlife Service has the ability to almost arbitrarily, designate specie and habitat as endangered or threatened, without any accountability. The Omnibus Property Act would make the Fish and Wildlife Service accountable by saying if it was really critical habitat and worth protecting, we would pay fair market value for it and it would be funded by the appropriate departmental budget. You can bet the supposed critical habitat would suddenly become much less critical. It would stop the Fish and Wildlife Service and others from saying, "there is no way we can fund this, therefore let's play Robin Hood and steal it for the public good by inverse condemnation."

I recognize that the Government has the right to declare eminent domain, but believe strongly that any exercise of that right should use just compensation, not unjust confiscation.

If it is believed to be the best good of the public to protect certain areas as critical habitat, it should be funded by the public on a shared basis nationwide, not by just those who have the misfortune of sharing their property with certain snakes, lizards or tortoises.

I wish I had the time to talk about the multibillion dollar impact of the Endangered Species Act on mortgages, lending institutions, retirement funds, real estate investments, and economic development; about its impact on grazing permits and how it has severely impacted our ranch as well as many others, or talk about how the Fish and Wildlife Services tried to weasel 25 percent of our irrigation water for moving a diversion and many other injustices. Maybe another time. I just hope that some degree of justice can be brought about by this proposed property protection act.

My only concern of the bill is I feel the critical value of take that engages compensation should be more like 10 percent, 15 percent instead of the 33 percent. I wish you all the luck in the world in this and thank you very much for listening to me.

[Prepared statement of Mr. Gardner follows:]

PREPARED STATEMENT OF LARRY H. GARDNER

I am Larry H. Gardner from St. George, Utah. My family has lived there since St. George was settled in 1862. I personally have lived there for all but a few of my 45 years. We have a ranching business as well as a business in town. I am also involved in education and I am presently serving on the St. George city council.

I appreciate the opportunity of speaking at this hearing and in so doing would like to thank you, Senator Hatch, for your aggressive leadership in protecting property rights. There have been many who have championed this cause in the past but in our mind, that leadership has never been more critically needed than now. Thank you for rising to the occasion.

It seems odd that we would even need to have this hearing to assess the need for laws to protect some of the most basic rights that we have in this good land, but the truth of the matter is, we have unfortunately come to this point. The proposed Omnibus Property Rights Act is not just an important act. It is essential!!! Particularly in the wake of the recent supreme court decision concerning the designation of critical habitat for endangered species on private property.

I needn't remind you that America was founded on principles of freedom and one of the most basic rights of this free nation is the freedom to own property, both personal property and real property.

The 5th Amendment to the Constitution states, "No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Even though this amendment is a critical part of the Constitution, it is glibly overlooked by many, particularly by those who have little or no property. Some environmentalists, Fish and Wildlife employees, other Government workers, and even Congress seem to have lost sight of the vital role that the 5th amendment plays in the exercise of our freedoms.

It is important that we understand A person's net worth is a general composite of all of his assets. Assets of course can be anything of value; i.e., the number of dollars you have, the value of the house you live in, the car you drive, the stocks and bonds in your investment portfolio, the amount of real estate you own, etc. The protection of that property is what the 5th amendment is all about.

Most people in America would not tolerate a thief stealing your money from a bank, nor would they allow an arsonist to set fire to your home, or a computer whiz to defraud your stocks and bonds, even if it was Robin Hoodish in nature in that the equity was to be used for public purposes such as parks, zoos, etc. The end does not justify the means. Why then do we look the other way, or even shout approval when the government makes paupers out of people by stealing equity from private property holders.

Nobody would debate the need for occasional government condemnation. And most understand how the 5th Amendment protects citizens in that process. Unfortunately, we have reached the point in America where the Government, the protector of the people, is now using circuitous and devious means to avoid that process and is destroying the financial well being of many of its citizens. By using regulations, policies, legislative acts and ensuing procedures of implementation, the government, through inverse condemnation, is obtaining private property without just compensation to that individual. They may not end up with clear title of ownership but by being able to tell you what you can do or can't do with your property, they have total control without ownership and without compensation, thus inverse condemnation.

A classic example is the way the Endangered Species Act impacts private property.

I must say that I do not disagree with the intent of the endangered species Act. In fact, I believe in the natural rights of plants and animals but I also believe that *priority must be given to the more important God given inalienable rights of man.* I support protection for and conservation of all animal and plant life, *but not at the expense or denial of the personal property rights of man guaranteed under the Constitution.* The consecration philosophy of the endangered species act is acceptable but I do not agree with the hidden agendas of certain environmentalist who seek to control private property and all public lands under the guise of this law.

Under the Endangered Species Act, huge penalties are levied for the destruction of any of the listed species or their habitat. Originally it was thought of in terms of protecting the bald eagle or the grizzly on public lands, but with the present listing of everything imaginable, including every subspecies, almost every fish, rat, or snail can qualify. With the hundreds of varieties now listed, and the 1000's that are candidates to be listed, one reaching tentacles of the Endangered Species Act. Habitats over lay all of the West and many other parts of the country. And not just on public land but on private land as well. All someone has to do to rob you of the value of your asset as previously mentioned is to find something on it that can be listed as endangered or to suggest that it is critical habitat. It used to be a 29 cent stamp was all that was required to confuse justice by filing a frivolous law suit, but today it is the 32 cent stamp and a request to list the plant or animal on your property as an endangered specie and you can kiss your equity good-bye.

The listing of the Desert Tortoise as threatened has had a tremendous impact on my family's equity as well as many others in our area.

Our family owns approximately 1200 acres to the north of St. George. At the approximate time of the listing of the Tortoise, we were seeking some financing and were anxious that we might either sell our land or use it for collateral for a loan. We therefore sought an appraisal. To our surprise, none of the appraisers that we talked to were willing to touch it. Their common statement was "If its got turtles on it, it isn't worth anything because you can't do anything with it."

That was a little difficult for us to accept because the adjoining land that we had previously sold was now developed into lots and selling for over \$30,000/acre." Not only did the value of the rest of our property become negligible, but the buyers disappeared as well. By calling our land critical habitat, the FWS had reduced our multimillion dollar equity to pennies and declared it fit only for a turtle park.

The government goes the extra mile to bring the blue collar thief to justice, spends thousands to catch the more sophisticated white collar criminal, but it has jumped into bed with the "green collar" rapist to take advantage of the private property holder.

Trying to rectify this problem has been an interesting experience to say the least. Because we were not the only ones affected, and because a good portion of Washington County was identified as suitable tortoise habitat, our county commissioners tried to be proactive in solving this problem by requesting a section 10, which under the Endangered Specie Act allows for the setting aside of critical habitat as a type of preserve in order that other habitat areas might be released for other uses as the property holder sees fit. That process has been going on for over 4 years now with debate after debate as to what doesn't. During all of this process, the Fish and Wildlife Service has held everyone else hostage. Their arrogant attitude and gestapo approach has been criminal in my mind. Time after time, when all the committee came to the table in good faith, with the spirit of compromise, the FWS hedged, extended deadlines, and made more ambitious demands. It became very obvious from the various debates that the science community could not agree upon the facts because they had no hard science, just a lot of supposition. The FWS was of the opinion that they had full latitude of the "May Affect Clause" in "The Act".

The most conclusive evidence that seemed to surface indicated that maybe the tortoise never should have been listed in the first place, but the FWS were running rough shod and rampant because they were untouchable. They could not be held to any degree of accountability in the whole process, therefore, they were making decisions based on pseudo science with blatant disregard to the financial impact on the property holders or other county residences. What did it matter to them if their conclusions were wrong? It was no financial loss to them. No skin off their nose. Green Collar theft at its finest! In the meantime, who bears the financial impact? The private property owner is the guinea pig in this whole experience. The only one left holding the bag and unfortunately the bag is empty.

Case in point. Our property was originally listed as high density habitat which means up to 400 tortoises/section. Because we strongly contested that designation, the BLM and FWS agreed to walk it with us. On two different days, seven of us walked the portion of our property that was designated as the prime portion of the critical habitat and after walking many acres found, to their chagrin, a total of 1 piece of scat, 1 shell of a dead tortoise, 1 den, and only one live tortoise. They simply did not have the scientific evidence to justify their actions. Fortunately for us, that portion of our property was not included in the final map of the recovery plan as being critical habitat. Even though we still have 240 acres listed in the middle of the proposed HCP, others have even more.

For good or for worse, the HCP is still on course with possible implementation this fall, but it hinges on several things happening. One of which is the super exchange, which calls for all of the private property within the boundaries of the HCP to be traded to the BLM for properties in other areas that don't have endangered species on them. Whether that will happen or not remains to be seen.

One of the challenges that is still facing this exchange is the value that is being placed on the lands to be traded. We agreed to trade value for value. The original agreement was that in order to facilitate the implementation of the HCP, the appraisers would treat the land as if there were no tortoise's present. Even though that was agreed upon, that opinion has flipped flopped several times and is still presently being debated. The third approved appraisal is now being made of our property. With the Tortoise on our land, we are told it is worth \$200-\$300/acre. Because confidential negotiations are continuing, I am not at liberty to say what the high appraisal is on the land, but without the presence of the Tortoise, let it suffice to say, the difference in equity between the high and the low on these few acres is about \$2,000,000.00 The difference for some of our neighbors would be 10 times that much. Are we expected to donate that equity in the name of patriotism or just because we like to think of ourselves as good philanthropic citizens?

My above example is only one little portion of one ongoing discussion, seeking for some sort of resolution. There are many others in this county and tens of property holders throughout the nation that are in similar circumstances. By one stroke of a pen, the FWS has had the ability to almost arbitrarily, designate specie and habitat as endangered or threatened, without any accountability. The Omnibus Property Act would make them accountable by saying if it is really critical habitat and worth protecting, we will pay fair market value for it and it will be funded by your departmental budget. You can bet that the supposed critical habitat would suddenly become much less critical. It would stop the FWS and others from saying, "There is no way we can fund this, therefore let us steal it for the public good by inverse condemnation."

I recognize that the Government has the right to declare eminent domain, but believe strongly that any exercise of that right *should use just compensation, not unjust confiscation.*

If it is believed to be in the best good of the public to protect certain areas as critical habitat, it should be funded by the public on a shared basis nation wide, not by just those who have the misfortune of sharing their property with certain snakes, lizards, or tortoises.

I wish we had time to talk about the economic impact of the endangered species act on mortgages and lending institutions, retirement funds and other real estate investments. About its impact on grazing permits and how it has severely impacted our ability to use our ranches to the highest and the best use, or to talk about how the FWS has tried to weasel 25 percent of our irrigation water for moving a diversion and many other injustices. Maybe another time. I just hope that some degree of justice can be brought about by this proposed property protection act.

I wish you all the luck in the world. Thank you for listening to me.

The CHAIRMAN. Thank you, Mr. Gardner.

Our last witness on this panel will be Mr. Edward Smith from Centerville. Smith bought into a town industrial development project but is now denied the use of his land because of artificially created wetlands on his property. His attempts to get permits thus far have been denied, as far as I know. So Mr. Smith, we'd like to hear your testimony at this time. We look forward to listening to you.

STATEMENT OF EDWARD D. SMITH

Mr. SMITH. Thank you Senator Hatch. I also enjoyed your preliminary remarks in reference to the Omnibus Bill. I think that will do us a lot of good. As mentioned, my name is Ed Smith and I reside in Centerville, UT.

Twenty years ago I purchased 1½ acres of dry agricultural property from a Mr. C. Taylor Burton. It was zoned agriculture at that time. Mr. Burton had done preliminary planning for an approximate 250 acre industrial park which would be zoned M-1. He had received preliminary approval from Centerville City for the plan. I purposely chose my 1½ acres because it was one of the highest elevated lots in the subdivision and it was close to freeway exposure.

I didn't know anything about wetlands, it was just prudent to save the field would be required because the new roads weren't engineered and elevated yet. Mr. Burton acted as liaison between the property owners and the city. Planning the new industrial district required many meetings with the property owners and the city. City counsel members and the city attorney were usually in attendance and minutes were always taken.

In February of 1976 the city gave notice of intent to create a special improvement district, and due to the cost of the scale down to 135 acres cited north and west of the Centerville freeway interchange. The city was unable to finance the improvements for the entire park so they decided to complete the basic improvements for the frontage road and the utilities and the laterals for our future interior roads, and then they required pledges from the property owners that we would indeed complete our interior roads and utilities before they would let the contract for the basic improvements. A year later, and unbeknownst to me, in 1977 the Wetland Act became law.

Well, the city proceeded with the basic improvements. The property owners began filling their lots and their roads indiscriminately without field permits and with encouragement of Centerville City. By December of 1979 the interior roads were completed and many of the lots were filled, some lots had buildings on them. The lots

that were not filled that were near catch basins, freeway drainage conduits, and drainage ditches become flood basins because there was nowhere for the water to drain, it was landlocked.

My property began to receive service water in the spring and it usually dried up by midsummer. My adjacent neighbor was receiving much more runoff. He had two acres to the south of me, and it began to get worse and worse each year as the building of east Centerville progressed. We were receiving more runoff, and now he has water on his property most of the year.

As a sidenote for proper chronology, I was later advised by the Corps that in 1980 they took an aerial photograph of my property where in the front portion of the property, about a quarter of the property, was shown filled. And the rear three quarters of the property was shown as a tinted brown color, which they described as saturated soils. I wasn't notified of that fact until 1993.

On September 20, 1982 the U.S. Army Corps of Engineers issued public notice of initiating and scoping, when Davis County Planning Commission applied for a permit to build approximately 687 acres of wetlands. That application included the Centerville industrial park property. However, very little of the industrial park area was shown as wetlands on their map.

They advised that within the 404 permit area there were approximately 1563 acres of which 940 acres were designated as wetlands by the Corps. They advised that the fill area consisted of approximately 687 acres of the total wetlands area and was indicated on their sheet number 2. The sheet referred to does not include my property, nor does it even come close to my property.

They advised that the remainder of the area not specified as wetlands was agricultural pastureland. They advised that the fill was required for commercial use for the wetlands area, that placement would require department of the Army permit and that environmental impact statements had been prepared for similar projects and they detailed three examples.

Later in 1993 Davis County told me that they had lost track of the application. By way of humor, in May 1986 the city advised me that ordinance 14 prohibited any lot from becoming the repository of stagnant water as it was a nuisance. I allowed clean fill on my property until April of 1993. I received a few partial loads of asphalt containing material by moonlight and later told the Corps that I would remove it. But neither the city nor the Corps were monitoring the moonlight dumps, nor were they posting signs or advising anyone to discontinue.

In May of 1993 the Corps cited me for discharging fill into a wetland on my property. I was in violation of section 404 of the Clean Water Act. They advised that they were conducting an investigation to determine the impact on the public interest and the action to be taken. I met a representative of the Corps at the property and felt very discriminated against as I was one of the last to fill my property and most of the others had buildings on them. They advised me at that time that there was no wetland map, that situations changed. They directed me to remove the fill or apply for an after-the-fact fill permit.

In October 1993 I submitted my application under Nationwide permit number 26 in section 404. In December 1993 the Corps ad-

vised that I did not qualify for a nationwide permit. They advised that I could file for an individual permit and they gave me 45 days to resolve the violation. They verbally later advised against an individual permit because if I was unsuccessful I would not have further recourse.

In December of 1993 I requested time to investigate the runoff to my property and attempt to dry it up legally so that the artificially created so-called wetland would go away. In January of 1994 I met with Centerville City in an attempt to locate the improper runoff in the catch basins and conduits, we found some problems with no solutions. About that time the city made my neighbor remove his fill wanted sign and the city erected a small fill prohibited sign between us. They did not explain why, but we assumed that it was due to the Army Corps of Engineers.

In August 1984 I met with another representative of the Army Corps who promised to review my file. I never had a response from that request and have had no response or communication with the Army Corps of Engineers since.

My property was not originally a wetland, it was—and it is now a low quality artificially created springtime runoff pond that Centerville City created by their industrial park. The U.S. Army Corps of Engineer know this but is taking legal advantage of it.

This concludes my remarks and I very much appreciate the few minutes of your valuable time, Senator Hatch.

[Prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF EDWARD D. SMITH

In approximately 1975, I purchased 1.55 acres of dry, upland, agricultural property, zoned agricultural, in West Centerville, UT.

On February 10, 1976, Centerville City created an improvement district for basic improvements and insisted on pledges from the property owners to complete the secondary interior road/utility improvements. On August 24, 1976, the City assembled the property owners for this purpose. Pledges were received on August 31, 1976.

The City completed the basic improvements and assessed the property owners their fees on April 3, 1978. I paid my assessed fees on June 2, 1978. In approximately December of 1979, most of the property owners completed the secondary improvements for the interior roads, including the new fill for same. At about the same time, many of the property owners began to fill their own property without resistance.

In 1980, I was later advised by the Army Corps of Engineers, that they took an aerial photograph of my property in which my property was shown only partially filled. The unfilled portion was tinted brown, which they interpreted as "saturated soils".

On Sept. 20, 1982, Davis county applied for a 404 fill permit with the Department of the Army, which included the Centerville Improvement District area. In that application, my property is shown as upland property and zoned "Industrial". As far as I can determine, the application died somewhere. Of the 940 acres designated wetlands by the Army Corps in that application, my property was not included, nor was most of the Industrial Park property. My property was not near the flow stations or collection points which they designated for drainage. It was my understanding, from that application, that only the predetermined wetlands required fill permits.

As I had not been notified by the City or the Corps about the aerial photograph or the fact that they considered any part of my property as wetlands, I continued to allow clean fill on the property until April of 1993. During that period, the property received a few unauthorized partial truck loads of asphalt containing material, which I later told the Corps that I would remove. Neither the City nor the Corps were monitoring the bad fill material dumped by moonlight nor did they post signs prohibiting same.

In May, 1986, the City advised that ordinance 14 prohibited any lot to become the repository of stagnant water, as it was a nuisance.

On May 5, 1993, the U.S Army Corps of Engineers cited me for discharging fill material into a wetland on my property. A Department of the Army permit had not been issued, so the fill was in violation of section 404 of the Clean Water Act. I do not know if anyone else in the area was cited. They advised me that they were conducting an investigation to determine the impact on the public interest and the action to be taken. I replied with a letter of explanation and a check for an after the fact fill permit which they refused and returned.

On May 12, 1993, I met their representative at the property and was totally shocked with their determined response.

I received a letter from the Corps dated March 25, 1993 wherein they advised me that I could remove the fill material or apply for an after-the-fact permit. They furnished me a copy of a Nationwide General Permit, number 26. On October 9, 1993, I submitted my application under Nationwide permit number 26 and section 404.

On December 15, 1993, the Corps advised that my project did not qualify for a Nationwide permit because the fill had not been minimized or avoided to the maximum extent Practicable and no compensation mitigation plan had been Presented to offset any wetland losses. They advised that I could file for an individual permit. They gave me 45 days to resolve the violation. They further advised that they were citing me for a partially dug, shallow ditch, that apparently my neighbor had created in an effort to drain the rear of his property. I furnished letters from myself and my neighbor to the north, certifying that we had not cut the ditch, which the Corps referred to as a "blatant violation". As far as I know, they did not attempt to find the guilty party and gave me until January 5, 1994 to restore the ditch. On December 29, 1993, I requested time to investigate the run-off to my Property in an attempt to dry it up so that the artificially created wet land would go away before I expended money to fill and grade the ditch that my neighbor created.

On January 3, 1994, I met with Centerville City in an attempt to locate the improper run-off from the catch basins or conduits. We found Some problems, but not the solution. In January, 1994, the City made my neighbor remove his "Fill Wanted" sign and they erected a small "Fill Prohibited" sign, between us.

On approximately August 25, 1994, I met another representative from the Corps at the property who promised to "review my file" but I have had no response. I have had no communication with the Corps Since August 25, 1994.

Respectfully,

EDWARD D. SMITH.

The CHAIRMAN. Thank you so much. We're happy to have the testimony of all three of you. Before I begin some questions, let me just recognize some of the individuals who are here. I don't want to miss anybody, but let me just mention some that I've seen.

State Senator Holmgren is here; State Senator Mantes is here; Ted Stewart, the director of the Utah State Department of Natural Resources; Delora Bertelsen, the mayor of Springville is here. I expect the speaker of the Utah house of representative, Mel Brown, to join us, and we want to express our thanks to Representative Brown for the use of this room and the facilities. We also note that there are other representatives and community leaders who are here and who will be joining us. I don't want to overlook anybody, but we'll let it go at that.

Let me just start with you, Mrs. Edwards, and ask a few questions about the experience that you've had. I want to thank you for coming here today. It is good to see you again. You said that you were forced to sell your land for only \$600 an acre. Now that sounds amazingly low to me. Do you have any estimate of what your land is really worth?

Mrs. EDWARDS. Well, we've had two appraisals on our land, and one was appraised at \$10,000 an acre, and the other appraiser appraised it at \$600. And then the wetlands—when they put it in wetlands, then they appraised it at \$1,000.

The CHAIRMAN. I see. So you had one at \$10,000, then you had another formal appraisal at, what, was it \$6,000?

Mrs. EDWARDS. The first appraisal that the city had done was \$600 an acre.

The CHAIRMAN. In other words, you had the appraisal not by the city at \$10,000, then the city appraised it at \$600 an acre. Was that after the wetlands?

Mrs. EDWARDS. Well, there was three appraisals done. The city had the first one, they had it appraised at \$600 an acre. And then we hired two appraisals, and one of them came in at \$10,000 an acre, and the other appraiser somehow it was put in wetlands and he had it appraised for \$1,000.

The CHAIRMAN. I see, that's what it is. Were you ever offered a fair price for your land—

Mrs. EDWARDS. No.

The CHAIRMAN [continuing]. By anybody?

Mrs. EDWARDS. No.

The CHAIRMAN. One of the things that I find most disturbing about uncompensated taking is the appalling number of the people, who like you, have purchased their land to support themselves for their retirement years, and then they turn around and have their life savings snatched from them, which is what you're saying here today. Now for years people in America always said you can't go wrong with real estate, but now it seems that you can.

Giving everything that has happened to you and your family, what advice would you give to someone today who is planning for their retirement?

Mrs. EDWARDS. What did I tell you before?

The CHAIRMAN. Go ahead.

Mrs. EDWARDS. Get a really good, honest attorney.

Unidentified SPEAKER. Where?

The CHAIRMAN. No, no, no. There is a limit. Well, your experience hasn't been a very good one, I have to say. I think that what you said in your opening statement really told the story of why you need this bill, and you did it eloquently.

Mrs. EDWARDS. Oh, we do need it, Senator Hatch, so bad.

The CHAIRMAN. Well, let me just ask you one more question: Do you think that had this bill been in effect at the time that your property was taken from you the way it was, that it would have helped you to defend your rights?

Mrs. EDWARDS. Oh, very much. Very much. Because they went on my property and I didn't even know what they were on there for. I couldn't find out what they were doing. They were down there digging test holes and surveying. And so I called a representative for the city and I said if you don't tell me what is going on my property, I am going to go down there with a gun and I'm gonna chase them all off. So then they came and talked to me.

The CHAIRMAN. I think I would have talked to you too. Now, you're saying that they took your property at a small price per acre because it was a wetland? That's why the low price?

Mrs. EDWARDS. Yes.

The CHAIRMAN. And they turned around and built a trailer park on it?

Mrs. EDWARDS. Yes.

The CHAIRMAN. And how much did you estimate the value of that trailer park was?

Mrs. EDWARDS. Eight-hundred thousand dollars.

The CHAIRMAN. And it's still operating today?

Mrs. EDWARDS. Well, it hasn't been going lately, I don't know. They have got it partly built and nothing is being done on it. And so I don't know. It is just kind of sit still. I keep thinking, well, if I get a trailer court, won't—trailer court, won't that be fun.

The CHAIRMAN. Do you know who owns the trailer park or what's—

Mrs. EDWARDS. I'm sorry, Senator Hatch?

The CHAIRMAN. Do you know who is going to own and run the trailer court on your property, on your—

Mrs. EDWARDS. No.

The CHAIRMAN. Is it the State?

Unidentified SPEAKER. State of Utah.

Mrs. EDWARDS. Yeah, it is the State of Utah that they are giving it to. See it is right to the side of the State park now that they have down there now.

The CHAIRMAN. I see. Well, see what I'm having trouble with is how they can basically take your land from you at a low price because it is wetlands, and turn around and build a trailer park on it.

Mrs. EDWARDS. And give it to the State of Utah.

The CHAIRMAN. And operate it as though it is not a wetland.

Mrs. EDWARDS. I've asked that every place I've gone and nobody tells me anything. And see, they took ground off the State on the southside of the river, and then they came over and took my ground to replace what they'd taken off the State park.

The CHAIRMAN. Well, I appreciate your testimony.

Mr. Gardner, let me just extend a special thanks for you coming all the way up from St. George to testify here today, and on such short notice. I appreciate your willingness to spend your own time and money to help me get the message out about the terrible problems that these uncompensated takings really are creating for good, honest people.

If I get your testimony correctly, all you're saying is that if the Government wants your land they can find a way to take it. All they have to do is trade you some land which is equal to what they took away from you, right?

Mr. GARDNER. We're willing to cooperate on that basis.

The CHAIRMAN. In other words, you're willing to give them the land that they claim is critical habitat if they'll trade to you land of coequal value as of the date of the trade?

Mr. GARDNER. Without reference to the endangered species, yes.

The CHAIRMAN. OK; now, do you think that this bill would help you if it was enacted to get a fair exchange for your land?

Mr. GARDNER. Absolutely. As I indicated, part of that land was maybe willy-nilly identified as critical habitat when in fact much of it is not. And HCP involves 55 to 65 square miles of Washington County, and of that, much of the land is BLM land, part of the State land. There are 35, I think, different private property holders in there.

The CHAIRMAN. So you're not the only one—

Mr. GARDNER. I'm not the only one.

The CHAIRMAN [continuing]. Complaining about the way they are handling it?

Mr. GARDNER. Absolutely. And it all hinges on this big super exchange. And for us to participate in it, we didn't feel like they needed our property. We like our property where it is, we like the location. It has got water through it, it has got power through it. It is ideally located for what we wanted to do with it. But we told them we were more than willing to cooperate to accomplish the HCP if in fact they would trade on an equal basis.

The CHAIRMAN. But you would prefer to keep your own land the way it is?

Mr. GARDNER. We're comfortable with that.

The CHAIRMAN. If you had the right to keep it and develop it the way you planned to do it, that's what you would do, right?

Mr. GARDNER. That was our preference.

The CHAIRMAN. But right now you are kind of in a limbo?

Mr. GARDNER. We haven't been able—we've had materials sitting there for 7 years to build corrals with, a feed lot, and it is just kind of sitting rusting in piles.

The CHAIRMAN. You can't build your corrals?

Mr. GARDNER. Well, we haven't known what to do, because we've been in limbo, exactly as you said. Negotiations have been going on with a lot of delays, a lot of—as I indicated, the arrogance of the department. I felt very concerned that they felt like they had perpetuity to deal with the issues. And in the meantime, my little brother has passed away. He was the one who was really aggressive in putting the feed lots in, so that's not gonna be his dream, obviously. But it might be for the rest of the family, if we can get that done.

The CHAIRMAN. Any reason—the reason you have not built your feed lots and corrals then is you are afraid to do so because you—they would——

Mr. GARDNER. Well, two reasons, I guess. I'm not opposed to going up there and pushing dirt and putting them in. I think under section 7 we might be able to get something done because there's not that very many—not very many turtles there. However, the Fish and Wildlife Service has used a lot of threats with other property holders in the area, threatening letters to indicate thousands of dollars in fines if they proceeded to do anything without the right permits.

The CHAIRMAN. And if you happen to kill one of the desert turtles?

Mr. GARDNER. Twenty-five thousand dollars per head.

The CHAIRMAN. In other words, if you accidentally—your horses trampled on—or cattle trampled on a desert tortoise and they found that tortoise dead on your land, you'd have to pay \$25,000 a head?

Mr. GARDNER. That's correct.

The CHAIRMAN. You heard of what happened at Tuacahn when they were building that?

Mr. GARDNER. I know that story very well.

The CHAIRMAN. Well——

Mr. GARDNER. It is very typical of others in the area

The CHAIRMAN. Well, I appreciate your problems that you have, we have got to resolve them some way. I think this bill will go a long way towards the resolution of these problems.

Mr. GARDNER. Very much so, thank you.

The CHAIRMAN. Let's go to Mr. Smith. I want to thank you for coming and telling us about the unfair treatment you believe you've received. And I do believe that it is a real problem in the bureaucracy in Washington, and that they back there have completely lost touch with the people and these type of problems. And, you know, instead of being servants of the people, they seem to be the lord and masters.

Well, I just want to make clear that everybody is clear about the injustice that happened to you. You have property which you bought 20 years ago, right?

Mr. SMITH. Yes, Senator.

The CHAIRMAN. Which the Corps said—that is the Corps of Engineers—said was not a wetland in 1982?

Mr. SMITH. That's correct.

The CHAIRMAN. OK; so you start off, the property you bought in good faith to develop yourself and it was declared not a wetland by the Corps of Engineers itself?

Mr. SMITH. Yes.

The CHAIRMAN. OK; then all of a sudden in 1993 they say it is a wetland and they turn around and blame everything on you.

Mr. SMITH. Yes, the representative explained it. Their quote was—is, "no wetland maps," and that situations change.

The CHAIRMAN. Well, given the closed door manner in which the Government has dealt with you, is there any way that you could have protected yourself or even have prepared for this problem?

Mr. SMITH. I have no idea how. I'm simply perplexed. I don't understand the whole process.

The CHAIRMAN. Well, I've asked the others and I'd like to ask you as well: Do you think this bill would be of help to you?

Mr. SMITH. Absolutely. My property would be—is of such low quality wetland, even if they choose to call it such, that the 1½ acres would be of no value to them.

The CHAIRMAN. Well, I think what is important here is that these are three isolated instances in Utah. But there are literally hundreds, if not thousands, of these instances, and thousands of potential problems like this with the accompanying fines, or low values, or poor exchanges, or whatever it is, for lands that really have been thought to be worth a lot of money, worth a lot to the families, worth a lot for retirement. People have worked and saved all their lives and built up these assets, then they turn around and find that they are almost valueless because of a government decision, in many cases an unjust and seemingly unwise decision. And you are just three illustrations of how bad it really is.

I just want to thank all three of you for being here, because it really bothers me a great deal. Someone who supports the protection of endangered species, who wants, you know, wants to protect our wilderness areas, who wants to do what is right environmentally. Frankly I do not go along with this type of stuff. I think it's wrong. I think it is wrong for you, it is wrong for our country, it is wrong for our State, it is wrong for our communities.

And I just want to thank each of you for coming because through your testimony here today hopefully we can—we can help others to see how important this type of legislation really is, to help correct these injustices and to prevent them from happening in the future. So thanks for being here, we appreciate it.

The CHAIRMAN. We are now going to turn to our second panel, which is our final panel for today. And on this panel will be Mr. Ken Ashby, Who is president of the Utah Farm Bureau, a very important person to all of us; Mr. Ronald W. Thompson, District Manager of the Washington County Water Conservancy District; and Mr. Richard G. Wilkins, Professor at the Brigham Young University School of Law.

So we will begin with you, Mr. Ashby. You are currently serving your 8th year as president of Utah Farm Bureau Federation. I have had a lot to do with you, I have a grade deal of respect for you. I found you to always be honest and to act in the best interest of the farmers of Utah and the State as a whole. You are also chairman of the Utah Department of Agriculture Advisory Board. You served on the American Farm Bureau board of directors, that is the National American Farm Bureau, its select committee on farm credit and is a member of the International Trade Issues Committee.

President Ashby is the owner of Ashby's Valley View Farms, a diversified irrigated farm in Delta. So we welcome you and we will take your testimony at this time.

PANEL CONSISTING OF KEN ASHBY, PRESIDENT, UTAH FARM BUREAU; RONALD W. THOMPSON, DISTRICT MANAGER, WASHINGTON COUNTY WATER CONSERVANCE DISTRICT; AND RICHARD G. WILKINS, PROFESSOR, BYU LAW SCHOOL

STATEMENT OF KEN ASHBY

Mr. ASHBY. Thank you, Senator, I appreciate the opportunity to be here with you. We are here to endorse the Omnibus Property Rights Act of 1995. The system for protecting the right to own and use private property has broken down over the last 20 years. We do not seek new rights. We want to reassert the rights that our Forefathers recognized over 200 years ago.

The "property rights movement" of the 1990's is simply a reaffirmation of what was started 200 years ago. The current regulatory climate at all government levels, the right to own and use private property has become an afterthought. Look before you leap and takings compensation legislation are simply attempts to move the rights of property owners up the policy ladder away from this afterthought status.

S.605 is an important step in rebalancing of power between property owners and government. You've listened to some examples of private property owners, let me give you just two other quick examples.

A northern Utah land owner has been locked in a 5-year struggle with the Army Corps of Engineers over the construction of the building on land designated as wetland, despite the fact that a city street goes right past the privately owned property. The Corps' de-

cision has reduced the value of the farm by 65 percent with absolutely no compensation. We think that this is wrong.

Another Utah landowner recently tried to grade and fill a ½ acre of low line land immediately adjacent to his new home on 1½ acres private lot. Because he was denied permission to do that, he tried to sell the property. The home and the land, the value dropped \$30,000 below an earlier appraisal due to this restriction.

Senate bill 605 requires the Federal Government to do three simple things. First, consider the impact on private property when government actions are planned. That is the concept of look before you leap. We are mystified by the negative reactions to such a simple idea.

Second, the legislation requires that when actions are taken and owners of private property believe that they have lost constitutionally protected rights, a process be in place to provide for administrative appeal of decisions. Few property owners have the money or the time to struggle with the bureaucracy and the courts. There has to be a way to sort out the facts and arrive at decisions.

Third, when property has been taken in violation of the Constitution, there has to be compensation. The fifth amendment recognizes that there would be times when the rights of property owners would have to give way to the wider needs of government policy. It provides for just compensation as a solution.

We must remember that private—that property taken to provide endangered species protection or other environmental desires for society has the same impact for the property owner as property takings provide say, for instance, a public road. If public policy requires something for the good of all, a few individual property owners should not be required to soldier the—shoulder the entire cost, notwithstanding the recent Supreme Court decision. That decision makes this legislation more important than ever.

The right to own and use private property as a way to order society to achieve economic abundance and social harmony is the antithesis of current public policy. It starts with individuals and their relationships to each other. What they do with their property is constrained by their responsibility to not harm the property and physical bodies of other people. Governments, as the courts and police, are the enforcers of the rights that the people naturally have as human beings.

Last, Mr. Chairman, we want to say the farmers and ranchers care deeply about their land and the environment. It is a tragedy that the current regulatory process in this Nation has come to the point that this legislation is necessary. Enactment of Senate Bill 605 is one of several steps needed to turn the tide of regulatory overkill.

Unidentified SPEAKER. Hear, hear.

Mr. ASHBY. The Omnibus Property Rights Act will provide the underpinning needed to restructure environmental protection.

Farmers and ranchers can and will provide the widest spectrum of environmental protection if their right of property is secure and they are freed from the disincentives under which they currently operate. Senate bill 605 is not about doing away with environmental protections. It is about protection of constitutional rights.

And with the passage of this bill, we in agriculture will do all we can to help you fashion a new environmentalism, one that taps into the ethic of the farmer and rancher, safe in our property and doing what we do best, caring for land, our crops, our herds, our children, our communities and our country.

Thank you very much, Mr. Chairman

The CHAIRMAN. Thank you. That's a very good statement and I appreciate it.

We will turn next to Ronald W. Thompson who is District Manager for the Washington County Water Conservancy District, the Regional Water Supply Agency responsible to develop water sources and resources for Washington County. He also practices law with the firm of Thompson & Hjelle and owns and operates a small livestock and farming operation.

Mr. Thompson is very active in various water resources organizations holding many leadership positions. He is also a recognized legal authority and lecturer on the Endangered Species Act and water law. We are really happy to have you here, Ron, and we look forward to taking your testimony at this time.

STATEMENT OF RONALD W. THOMPSON

Mr. THOMPSON. Thank you, Senator, I appreciate the opportunity to appear before the committee and I want to speak in favor of Senate bill 605.

Our Government was formed and founded on the principles of consent of the Government as well as the right to own and secure property without the fear of intrusion. Under the current practice of Federal agencies of taking without compensation, these fundamental rights are slowly eroding away. In a recent poll, two out of three Americans stated they had an eminent fear that the Federal Government would somehow take over one or more aspects of their lives. Loss of their private property is one of these fears. This clearly shows that the Federal Government is losing the consent of the governed.

I support the bill as a bill that has long been necessary and will serve to rectify these problems as well as greatly improve the relations of the Federal Government with private citizens and State and local governments. This bill restores the balance that is needed between the rights of individual citizens and the role of government in their lives.

The bill successfully protects property rights not only because it preserves principle, but also because it promotes responsible practice by Federal agencies. There are several ways the bill does this. First of all, the definition of property includes "easements" and "leaseholds," "the right to use water or the right to receive water" and "any interest defined as property under State law." It is important these rights as well as the actual land be protected equally since their use is equally necessary for the livelihood of the property owner. Some good examples of rights such as these that have not been protected in the past are the RS 2477 rights-of-way, Federal land leases, utility easements, and water rights.

Many problems exist in Utah with Federal agencies not recognizing RS 2477 rights-of-way. A prime example is the Cougar Pass Road in Washington County. This new road is important to the

Water District because it provides access to the Beaver Dam area, and its important ongoing studies monitoring water quality and quantity along with work we're doing with the USGS in stream gauge operation. Several years ago, the road was badly in need of repair. The county attempted to do some maintenance, but was prohibited by the BLM. An attempt was made to obtain authorization from the area office, but the local manager simply wrote a letter citing FLPMA saying the authorization would have to be obtained from the Washington DC office; an EA would have to be completed, among other things, because the road bordered a wilderness study area, any maintenance might be too disturbing, even though the road itself was not in the wilderness study area.

Another recent problem we have had relates to water right protection and easement rights illustrated—which also illustrates the importance of the bill. The Quail Creek Project was built by the Water District in 1983. It consists of a diversion dam, 4.7 miles of 66 inch pipeline, 1.2 miles of 54 inch pipeline, 3.1 miles of 48 inch pipeline, two hydropower plants, and a 40,000 acres off stream reservoir.

The portion of the pipeline from the reservoir and part of the reservoir itself are located upon BLM lands, the use of which were authorized by BLM right-of-way. Prior to issuing the right-of-way the BLM entered into a section 7 consultation with Fish and Wildlife Service. The result of this consultation was a nonjeopardy opinion. This opinion was based upon a water simulation model submitted to the district—by the District to the BLM and Fish and Wildlife. The model simulate exactly how the reservoir and pipeline would be operated and how they would affect the flows in various segments of the river. The District has consistently operated the reservoir in accordance with these simulations submitted to the BLM and the Fish and Wildlife Service.

Nevertheless, in response to a perceived, but unverified, long-term decline in the populations of the proposed listed Spinedace minnow and the Virgin River Chub, both of which have been listed or proposed to be listed after the building of the Quail Creek Reservoir, the Fish and Wildlife has asked reconsultation on the project. They are now stating that they need a release to bypass our diversion dam 86 CFS.

If such conditions were to be imposed upon the project, it would destroy the entire basis upon which it was constructed. The release of 86 CFS would prohibit the district from meeting the long established (prior to 1900) water rights or the commitments from water delivery to St. George city and other municipalities. It would also prohibit the efficient operation of hydroplants along with destroying the economic justifications of this project, and ultimately result in default of obligation bonds incurred by local people to build this project.

The second important feature of the bill is that it gives more leverage to States in terms of the way they treat private property owners. It requires the Federal Government not only compensate owners for its action, but also for the deprivation of property rights that result from State agencies' enforcement of Federally mandated programs. States are also guaranteed by the bill it will not "inter-

fere with the authority of any State to create additional property rights."

Third, the Federal Government is charged in title IV to "avoid taking of the private property by assessing the effect of government action on property rights." Along these same lines, Federal actions must comply with State laws, and appropriate Federal agencies must implement Endangered Species Act and the Federal Pollution Control Act, the Clean Water Act, with the least possible impact on private property. And Federal agencies must review all current actions and make sure they are in compliance with this act.

Finally, property owners are given concrete rather than simply implied property rights. One of the findings in the bill mentions that currently, private property owners are being forced by Federal policy to resort to extensive, lengthy, and expensive litigation to protect basic civil rights guaranteed by a Constitution. This has certainly been proven true by the numerous lawsuits filed in the last few years that are still pending. But the problem is rectified by amendments the bill proposes for the Endangered Species Act and the Federal Pollution Control Act that give property rights—property owners the option to appeal administrative decisions, and also to participate in management agreements. Another problem that has recently been brought up by the current administration is the right of Federal agents to trespass on private property to conduct agency actions. This bill requires these agents to receive written consent from the property owners before conducting such actions.

In summary, the bill clarifies as well as emphasizes the importance of the property rights guaranteed to American citizens by the U.S. Constitution. The bill solves many of the problems faced by property owners and local governments in dealing with Federal agencies who don't seem to want to recognize these constitutional rights. I wholeheartedly support the bill and thank you, Senator Hatch, for taking on this important issue.

The CHAIRMAN. Thank you. Thank you very much for your excellent analysis.

Professor Richard G. Wilkins is a professor at the J. Reuben Clark Law School at Brigham Young University, where he has been such since 1984. He has published in numerous legal journals on a variety of issues, including the takings clause of the Constitution. We're very pleased to be able to have such an outstanding expert in our midst this morning. Professor Wilkins, thanks for taking time out of what we know is a busy schedule for you to be here, appreciate you.

STATEMENT OF RICHARD G. WILKINS

Mr. WILKINS. Thank you, Senator Hatch. I am pleased to have the opportunity to testify in support of Senate bill 605. In my opinion the bill addresses and provides effective redress for one of the most troubled areas in modern constitutional law; that is, pouring some enforceable content into what otherwise might become empty words of the takings clause of the U.S. Constitution. The bill also addresses and alleviates an unfortunate jurisdictional tangle that has developed between the U.S. Court of Claims and the U.S. Dis-

strict Courts. For both of these reasons, I think the bill urgently needs passage.

The need to provide effective statutory protection for regulatory abuse of private property rights is absolutely plain. The Supreme Court has attempted to annunciate and to enforce workable limits on the takings clause, but that effort in large measure has proven exceptionally difficult, if not impossible. Section 204 of Senate bill 605 in many ways simply restates current constitutional doctrine.

Subsection (A)(1) and (A)(2), (A), (B), (C) and (E), for example, simply set out the current tests for takings clause annunciated by the U.S. Supreme Court in its most decision—in its most recent decisions. Therefore, these provisions of the bill are really rather unremarkable unless of course you happen to be, I think, one of the relatively small minority of constitutional scholars who are terribly unhappy with them. The provision that I find most noteworthy, however, in Senate bill 605 is subsection (2)(D) of section 204 which, as I understand it, puts remedial teeth into a constitutional principle that harks back to Justice Holmes' 1922 opinion in *Pennsylvania Coal v. Mahon*. The principal is this: While modern government undoubtedly has the power to regulate despite incidental effects or impacts on property value, that governmental regulation may not go, "too far," without violating the takings clause. The Supreme Court has simply been unsuccessful in effectuating that principle.

At this point in my prepared remarks I had some law professorly kinds of hypotheticals, but they would be rather sterile and not nearly as dramatic as the ones you've already heard. So I'll just skip over that right to the governing constitutional doctrine.

That doctrine is settled and it is what Justice Holmes said in 1922. You may not go, even in the course of protecting such notable goals as protecting Endangered Species and tortoises, you may not go "too far." In 1960 the Government, or the Supreme Court, perhaps more cogently explained the purpose of the clause is, "to prevent some people alone from bearing public burdens which, in all fairness and justice, should be borne by the public as a whole," the *Armstrong* case, which is in fact cited in the legislation. The result that's dictated by either of these legal tests, however, is hardly self-evidence. Even if you grant that the Government may not go "too far" in intruding upon private interests, what distinguishes the far from the near? And then if you say, even if we can't force private owners to bear disproportionate burden, well when is the line of disproportionate burden crossed?

The Supreme Court cases that have addressed this troublesome issue have managed to give us almost no guidance. Indeed the court has managed to protect property owners in only two rather discrete categories of cases. First, when government actually physically takes property, you are paid. Even that difficult—even that rather clear area though is becoming muddy because of some of the testimony you've heard today. Physically take property that happens to be a tortoise or a wetland or some other archaeological site, for example, on the property. Property which use to be worth substantial sums of money becomes worth very little.

The second area where the Supreme Court has been able to give at least some guidance is that they have stated if the Government

deprives the owner of all economic value, then compensation is required. That is perhaps even a little comical as well, because some Supreme Court Justices have suggested that if you have the right to go back and look at your property or perhaps picnic on it, you haven't been deprived of all value. Between these two relatively clear lines there is, however, a vast area of uncertainty. It is in this area that Senate bill 605 provides necessary guidance.

The Supreme Court has simply been unable to identify when government goes "too far." One perhaps shouldn't be too hard on the court and the court's vacillation in this area. The problem has many, many facets, including such philosophical questions as what do we even mean by property rights in the first place? And then such essentially political issues as how do we balance the relative interests of individual property owners against the need of the public? There is also limits, I think, on the practical competency of courts to simply declare that a legislative goal goes so far that it is unconstitutional. Very difficult for a court to say it is somehow unconstitutional to protect a desert tortoise.

Senate bill 605 obviates all of these difficulties by providing a very clear remedial rule. Government goes "too far" when it diminishes the fair market value of the affected property by 33 percent or more.

I think that this bill is absolutely vital to finally put some teeth into Justice Holmes' 1922 dictum. I think it is also quite appropriate that it be handled by the U.S. Congress. Congress has a duty to implement the fundamental values that are expressly stated in the Bill of Rights. Protecting fundamental values of the Constitution is not merely a job for the U.S. Supreme Court, this a job the court in fact hasn't done a very good job of protecting, and I think it is not only appropriate, but exceptionally wise for Congress to step in to fill a void.

Senate bill 605's bright-line approach to resolving when government action goes "too far" has a lot to commend it. It is straightforward and understandable. Much of the Court's current jurisprudence regarding when government goes "too far" simply gets bogged down in essentially philosophical debates about what's the most important property interest. You have some very strange opinions that say, so long as you have the right to look at your eagle feathers you haven't had them taken, even though eagle feathers that use to be worth millions of dollars are now worth nothing.

The line drawn by Senate bill 605 not only resolves these kinds of philosophical debates, I believe that it effectuates a rough and fair balance between public need and individual rights. Any government regulation, of course, will have an impact upon property values someplace. I think you could probably find an economist who would look at the most mundane in government regulation and tell you exactly how it was gonna affect someone's pocketbook.

So Justice Holmes recognized this back in 1922 when he said, "government could hardly go on," if we had to compensate for every single effect. But the court has been unable to provide any coherent stopping point short of absolute and total confiscation. Indeed, I think the Court's cases could be read as saying anything short of total confiscation does not constitute going "too far." And some jus-

tices have expressly suggested that being able to picnic on your property is enough to avoid a constitutional taking.

Senate bill 605, in effect, decrees that government regulation may deprive a property owner of as much as 33 percent of the value of property owners property, but beyond that point, any further exaction is a cost that must be borne as the public as a whole—by the public as a whole.

In addition to resolving this very important remedial problem, I think Senate bill 605 also eliminates a troublesome jurisdictional tangle that right now may be more of interest to attorneys, which will certainly become very much of interest to the people who testified previously today if they actually went into court to try to protect their rights.

At the present time, the litigant who seeks to enjoin government regulatory action in Federal district court may be met, and in fact in my experience will be met, with the claim that they should have gone to the court of claims, because the Constitution doesn't prohibit government action, it merely requires compensation. However, once you get to the court of claims, you are met with the obverse jurisdictional argument that hey, we don't have to pay any money because you didn't enjoin the Government action in the first place in the U.S. district court. Current law, in short, permits the Government to argue the jurisdictional equivalent of "heads we win, tails you lose," and deprive U.S. citizens of any effective forum to protect their constitutional interests.

This bill resolves that problem by providing that both the Federal district courts and the court of claims shall have concurrent jurisdiction over monetary claims brought under the legislation, and this provision as well as the remedial provision of this bill, is most helpful and most needed.

[Prepared statement of Mr. Wilkins follows:]

PREPARED STATEMENT OF RICHARD G. WILKINS

I am pleased to have the opportunity to testify in support of Senate Bill No. 605. The Bill addresses—and provides redress for—one of the most troubled areas of the Supreme Court's Takings Clause jurisprudence: that is, when does government regulation go "too far"? The bill also addresses—and alleviates—an unfortunate jurisdictional tangle that has developed between United States District Courts and the Court of Claims. For both of these reasons, I hope that the Bill will be passed and signed into law.

I. WHEN DOES GOVERNMENT REGULATION GO "TOO FAR"?

The need to provide effective statutory protection for regulatory abuse of private property rights is plain. Although the Supreme Court has attempted to enunciate and apply workable limits on governmental power under the Fifth Amendment's Taking Clause, that effort has proven exceptionally difficult. The difficulty, moreover, has stemmed—not from the Court's inability to discern governing principles—but from its inability to pragmatically apply those principles to discrete cases. Section 204 (a)(2)(D) of Senate Bill 605 effectively addresses this remedial "gap".

Section 204 of Senate Bill 605, in large measure, restates current constitutional doctrine. Subsection (a)(1), for example, restates the rule in *Tharetto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Subsection a(2) (A), (B) (C) and (E) set out the tests enunciated by the Supreme Court in its recent decision in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), *Lucas v. South Carolina Coastal Counsel*, 112 S. Ct. 2886 (1992), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). These provisions, therefore, are rather unremarkable (unless, of course, one disagrees with the decisions just noted). The provision that I find most noteworthy in Senate Bill No. 605 is Subsection a(2)(D) of Section 204 which, as I understand it, puts remedial teeth into a constitutional principle that harks back to Justice

Holmes 1922 opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 412 (1922). That principle is this: While government has the power to regulate despite incidental impacts on property value, government regulation may not go "too far" without violating the Takings Clause. The Supreme Court has been remarkably unsuccessful in effectuating this principle.

A hypothetical illustration highlights both the tensions inherent in Justice Holmes's dictum and the difficulties that have plagued the Supreme Court's efforts to enforce it. Suppose that a developer purchases a piece of property near an urban area that, for many years, has been zoned for high-density commercial development. The property, put to its highest and best commercial use, has a value in excess of \$10 million. However once development begins, the property is determined to be the habitat for an endangered—and federally protected—animal species. As a result, property that once was worth \$10 million comes to have—little (or no) commercial value.

Some version of this hypothetical scenario is played out again and again in modern society. On the one hand is the property owner who legitimately believed that it had the right to develop and use a classic property interest in a profitable manner. On the other hand is the legitimate need of the public to preserve important public interests. How are these conflicting interests to be mediated?

The governing constitutional doctrine is relatively clear: government, in the course of furthering even such important goals such as protecting endangered species, may not go "too far". Or, as the Supreme Court somewhat more cogently explained in 1960, government may not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The result dictated by either of these formulations, however, is hardly self-evident. Granted that the government may not go "too far" in intruding upon the right of a property owner in the course of furthering even important governmental interest, what distinguishes the far from the near? Granted that government may not force some property owners to bear a disproportionate burden of the cost of protecting endangered species, when is that line crossed?

Supreme Court cases addressing the issue give little concrete guidance. Indeed, the Court has managed to protect property owners in only two rather discrete categories of cases. First, when government regulation constitutes an actual, physical intrusion upon property, the property owner must be compensated, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Second, if government action deprives a property owner of all economic value, compensation is required. Senate Bill No. 605 preserves (and effectuates) these jurisprudential rules. Section 204(a)(1); (a)(2)(C). Between these relatively clear lines, however, lies a vast area of uncertainty. It is in this area that Senate Bill 605 provides welcome clarity.

The Supreme Court has been unable to identify precisely when government action goes "too far". (In fact, one could even argue that the Court has been unable to apply its relatively "clear" physical invasion and total loss of value rules.)¹ One, perhaps, should not be too critical of the Court's vacillations in this area. The problem has many facets—including such determinations as how to define "property" in the first place (*Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 (1987)) and how to balance the relative interests of individual property owners and the public (*Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978)). Senate Bill 605 obviates these difficulties by providing a clear remedial rule: government goes "too far" when it "diminishes the fair market value of the affected portion of the property * * * by 33 percent or more with respect to the value immediately prior to the governmental action." Section 204 (a)(2)(D).

The legislation, in sum, finally puts teeth into Justice Holmes's 1922 dictum.

Senate Bill No. 605's bright-line approach to resolving when government action goes "too far" has much to commend it. It is straightforward and understandable. Several of the Supreme Court's discussions of when government goes "too far" have

¹The clarity of the "physical invasion" and "deprivation of all value" lines is often more apparent than real. For example, determining when a "physical" invasion has occurred has proven difficult. In the development hypothetical noted above, for example, the property owner may plausibly claim that—in the course of protecting the endangered animal—the government has imposed an easement limiting development on the affected property. If so, has there been a physical invasion requiring compensation? The property owner, furthermore, may well argue that, because regulation has effectively destroyed the commercial value of the property, it has lost "all economic value." If so, the government will predictably reply that the owner has not lost "all value": after all, the property owner may still visit the affected property for family picnics and other outings. (See, e.g., the dissents filed in *Lucas*, 112 S. Ct. 2886 (1992)). The Court has hardly been consistent in addressing (and resolving) such arguments. Compare *Lucas* with *Andrus v. Allard*, 444 U.S. 51 (1979).

become bogged down in essentially philosophical debates regarding the meaning and nature of property. Is property a "bundle of rights"? If so, what is the most important "stick" in that bundle the right to exclude others? Or is the most important stick, perhaps, the right to develop property rights to their full economic potential? Divisions between the Justices on such issues, as evidenced by the various opinions in *Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470 (1987), give legal theoreticians and philosophers grist for learned discourse, but provide little practical help for either property owners or government regulators. This philosophical debate regarding the nature and protection of property rights, moreover, shows little sign of being resolved by the Supreme Court. The legislation, therefore, settles an important remedial issue by declaring that property rights are essentially economic rights.²

The line drawn by Senate Bill 605 not only resolves the philosophical debate just noted, it effectuates a rough (and I believe) fair balance between public need and individual right. Any government regulation, of course, will have an impact upon property values somewhere. Justice Holmes recognized that fact in *Mahon* when he noted that "government hardly could go on" if it had to compensate owners for every adverse effect of regulatory actions upon property rights, 260 U.S. at 413. But the Court has been unable to provide any coherent stopping point for the pragmatic need noted by Justice Holmes. Indeed, the Court's cases could be read to support the proposition that government regulation never goes "too far" unless it effectively deprives a property owner of all economic use or value of its property. *Lucas*, 112 S. Ct. 2886 (1992). Senate Bill 605, in effect, decrees that government regulation may deprive a property owner of as much as 33 percent of the value of its property, but—beyond that point—the exaction is a cost that should be "borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

There will be academicians and theorists, of course, who will be dismayed by the rather straightforward, pragmatic lines drawn by this legislation. Some may protest that linking property rights with "fair market value" ignores other important values that inhere in the "bundle of rights" known as property. Others will argue that prohibiting government from taking more than 33 percent of the market value of identified property improperly and arbitrarily ties the hands of government. I have no doubt that cogent arguments can (and probably will be) made along both of those lines.

Such arguments, however, do not give me significant pause. If the Supreme Court were to adopt the pragmatic lines drawn by this legislation, the arguments that property involves more than mere economic value and that government regulatory authority should not be limited to an arbitrary percentage of that economic value would have real weight. But Senate Bill No. 605 does not establish a constitutional limit to the definitions of property, nor does it set a constitutional barrier to the exercise of government power. If experience demonstrates that either the purely economic definition of property or the 33 percent limitation on cost-free government action in unwise, the legislative power is sufficient to protect the public interest.

In the meantime, this legislation provides a clear—and needed—remedial rule in an area where Supreme Court adjudication has been unsatisfactory. The legislation pours workable content into the constitutional edict that government not go "too far" in interfering with property rights.

II. WHICH COURT HAS JURISDICTION UNDER THE TAKINGS CLAUSE?

In addition to resolving the remedial problem just noted, Senate Bill 605 also eliminates a troublesome jurisdiction tangle that has developed between United States District Courts and the Court of Claims.

At the present time, a litigant who seeks to enjoin government regulatory action in Federal District Court on the ground that it violates the Takings Clause will likely be met with the argument that, since the Takings Clause does not prohibit government action but only requires just compensation, the District Court lacks jurisdiction because the proper forum is the Court of Claims. Litigants who are prescient enough to proceed directly to the Court of Claims, however, will be met with the government argument that a damages claim is premature because injunctive relief (not available in the Court of Claims) was not sought in Federal District Court. Current law, in short, permits the government to argue the jurisdiction equivalent of "heads I win, tails you lose."

² Compare *Andrus v. Allard*, 444 U.S. 51 (1979) (Court concludes that federal regulation which effectively destroyed all economic value of certain Indian objects did not constitute a taking because, even though objects had no commercial value, the owner retained the right to possess them).

Section 205 of Senate Bill 605 resolves this problem by providing that both the Federal District Courts and the Court of Claims shall have concurrent jurisdiction over monetary claims brought under the legislation, and by providing both courts with injunctive power to invalidate government action which violates the legislation.

This provision is helpful and most needed. As I have noted above, some may argue that the substantive lines drawn by Section 204 of the legislation are unwise. Similar arguments, however, can hardly be made about Section 205. Whatever one's views regarding the proper definition of property rights, or the extent to which the government should be permitted to adversely impact property rights without paying compensation, it is simply not appropriate to permit the government to whipsaw litigants by claiming—wherever the suit is filed—that it was filed in the wrong court.

The CHAIRMAN. Well, thank you so much. That was a very scholarly presentation.

Let me start with Ken Ashby first, the president of the Farm Bureau. I want to personally thank you for coming today, President Ashby. The Farm Bureau has been a strong supporter of property rights, and we would do well if we had more organizations like yours with their members that do as good a job.

Mr. ASHBY. Thank you.

The CHAIRMAN. In your statement you noted that current support for property rights is merely a reaffirmation of the rights this Nation was founded upon. Do you see this bill as returned to those original beliefs or an expansion of those original beliefs?

Mr. ASHBY. I think it is a return to that and property rights are what this country was established on and—

The CHAIRMAN. You might want to move those mikes over.

Mr. ASHBY. I believe it is a reaffirmation of those rights that were established when this country was founded.

The CHAIRMAN. What kind of difference do you think this bill will make in changing the way in which bureaucrats in Washington treat our people here in Utah?

Mr. ASHBY. Well, I think that really turns the tide in that and put it back to where the individual who owns property can stand and have that recognized. And bureaucrats will really take a lot closer look at the regulation when they think of doing something. They will need to stop and say now, you know, what effect is this having on private property. Which at this point in time, as I said, is an afterthought. That's the very last thing that is thought about in the present regulatory arena.

The CHAIRMAN. I submit many times that is not even thought about period.

Mr. ASHBY. I would suppose that is true.

The CHAIRMAN. Well, how much help do you expect this bill will be to Utah's farmers and ranchers if we can get it passed?

Mr. ASHBY. I think it would be a great deal of help, as we have heard from the testimony of these three today, and I cited two other examples. There are many more out there that would fit in the same category. And those of us who are still out there on the land, it would certainly give us a much more calm feeling about what is going to happen to our property for our children in the future or what we might use as retirement as we get to that age.

The CHAIRMAN. Thank you.

Mr. Thompson, I want to thank you very much for being with us today and giving the excellent testimony that you did. You are a well recognized authority on water rights and your testimony

shows that again. And no discussion of Utah's property rights would be complete without mention of water rights.

You noted the growing distance between Americans and the Government. Some 60 percent or more of the American people believe—well, that they are afraid of their government. And you think one of the reasons is what is happening in this takings area. It seems to me that all our people want in this country is a chance for a fair fight when they disagree with the Government. Do you see this bill providing and giving them that chance?

Mr. THOMPSON. Yeah, I certainly do. I think the bill really helps—I think it helps in three areas—it helps in several—but three important areas. One, is it requires the agency is gonna treat the property rights, to look at alternatives that don't require that.

Secondly, it requires if in fact they're gonna do it, that the burden is spread broadly and comes out of their own budget. So they are gonna have to think of that.

And the third issue is, if they're gonna go on people's private property, particularly for these studies and environmental regulations, that they have to notify and maintain consent. I think that starts leveling the playing field, and then of course we solve the other issues.

I personally don't think that long-term any government is well served that requires ordinary people to have to hire lawyers to sue their government. I think we need to find ways that allow people to do business and to respect the process, like one of the problems in the last 20 years is that we've really lost that respect for the process. It's too complicated, people don't understand it, it requires too many kinds of experts to deal with the problem and it takes far too long to resolve the problem.

The CHAIRMAN. Returning to the question of water rights. How big a problem is it for the people of Washington County when the Government threatens to reduce water rights?

Mr. THOMPSON. Well, it's—we're, of course, Utah's the second driest State in the Nation, and Washington County's the driest county in Utah. So in our area, which is one of the fastest growing counties, that's an extremely serious problem. Our economy could be devastated by how we ultimately resolve these issues.

And frankly, it is very frustrating as you take the environmental regulations where they want to come in and simply take water, and the West which has been seen as a property right and used as a property right without any compensation, or without a recognition of what impact it has on the collateral value of real properties. As was once said, when you get in the West, it's the water that has the value. Land without water is essentially worthless in the West.

The CHAIRMAN. How would you expect this bill to help you solve those water right problems?

Mr. THOMPSON. First, it recognizes that water right, I think, is a property right. Secondly, it recognizes that property has to have the ability to transport the water to the property to have a value. So it starts protecting the underlying easements and transmission facilities that often in the West cross or are impacted by the Federal regulations. It recognizes that there's a value that goes to the property by having these easement facilities.

The CHAIRMAN. Well, I appreciate that.

I'd also like to thank you, Professor Wilkins, for being with us here today. I think you've done an excellent job of summarizing exactly why we need legislation to protect property rights in general, and S. 605 in particular.

I believe that this bill merely reinforces—actually not reinforces—just enforces the fifth amendment by restoring balance and fairness to the property rights versus regulation analysis. However, some people have claimed that this bill is not just protecting the constitutional rights, but expanding them.

Do you believe that this bill creates any rights beyond what the drafters of the Bill of Rights mentioned?

Mr. WILKINS. Certainly not. I think it essentially makes the fifth amendment enforceable in the context of the modern regulatory state. One of the things that has happened in this century, is government has found out that they can do all kinds of things essentially cost free, by shifting the bulk of the cost over onto the shoulders of individual property owners.

And the Supreme court, I think, for institutional reasons has been very, very slow to come up with effective constitutional remedies here. Because, you know, when you are faced with a need to protect the desert tortoise, and many, many people believe, as I do, that, you know, we should protect endangered species. There are some important public values that are effectuated by such protection. But the Supreme Court has been left with a rather stark choice of either saying to the property owner, you get no money; or government, you have behaved unconstitutionally.

That's why I think this is a classic example, you know, I would analogize it to congressional decisions under the fourteenth amendment implementing civil rights. It has certainly been appropriate for Congress to provide legislative remedies to enforce the fourteenth amendment rights, in fact that's accepted as common place today.

I think all that is happening here is Congress in an analogous way is providing an enforcement and a remedial mechanism to enforce constitutional rights that the court has simply been unable to protect.

The CHAIRMAN. Well, a lot of people don't realize that the court only can decide the cases and the factual situations that are brought to it. Then they decide according to the major rule of statutory construction, in the most narrow way they possibly can.

Mr. WILKINS. Exactly.

The CHAIRMAN. So we're limited to case-by-case resolution of these difficulties which could take decades.

Mr. WILKINS. And it hasn't been resolved yet. I wrote a law review article after being involved in a very unfortunate case where essentially because the governmental unit wanted a scenic easement across some property, property that was worth \$26 million, suddenly was worth several thousand dollars. And in any realistic sense, the people of this governmental entity had simply condemned the scenic easement, and they got it for free.

And when we finally got to the Supreme Court it got four descending justices—or three descents on the denial of certiorari. The fact of the matter is, the court has simply been unable to protect these kinds of interests. And the Founding Fathers, I believe,

would have clearly intended these kinds of interests to be protected when they wrote the amendment.

The CHAIRMAN. Oh, yes. That's another issue with the courts. The court's sitting on certiorari I might get as many as 150 to 1,500 cases or petitions for certiorari, I'm only able to choose a very small number of those to begin with. And if the case didn't catch their imagination, at least the imagination of the forum, you're in real trouble on certiorari.

Mr. WILKINS. And this is an area where the court has been unable to come up with stable majority so they avoid these kinds of cases to begin with.

The CHAIRMAN. That's interesting. You noted that this bill provides clarity in a very murky field of law. And I agree. Could you expound for just a moment on how that clarity will help people to protect their property rights should this bill be enacted.

Mr. WILKINS. It's a tremendous help, because right now with the law as it currently stands, all you have is these rather broad dicta. Government can't go "too far." You can't put burdens on individual shoulders that the public should bear. An individual property owner faced with that state of the law has such vast uncertainty, the only thing left they have to do is hire a very expensive lawyer and commit yourself to years and years of litigation.

The Government, on the other hand, has tremendous leverage to say accept this little pittance we're throwing your way, because by the way, haven't you read Justice Stevens's dissent in *Lucas* where he said, so long as you can picnic on your property, you haven't lost it.

And so there is a lot of governmental leverage against the private property owner, vast uncertainty facing the private litigant, and because of that, simple laws of economics are that the poor property owner cannot protect his or her interest.

With this clear rule, what it would come down to is you would go get your appraiser, the Government—and I think it helpfully provides that the Government has the burden of demonstrating that it doesn't diminish the value by 33 percent. When you have that clear line, all of a sudden property owners have some economic muscle behind them, the law is clear.

I think there will be a lot of quibbling over whether the line should be 10 percent, 15 percent, 25 percent, 33 percent. And I think that's essentially a legislative policy decision. But whatever line the U.S. Congress finally adopts, it will finally put some teeth into that old 1922 decision.

The CHAIRMAN. As I've said many times, the strong protection of property rights works in harmony with protecting the environment. And I refer specifically to the exception for compensation where the Government is preventing a nuisance.

Mr. WILKINS. Exactly.

The CHAIRMAN. Would you discuss for us here today how a nuisance relates to the—the law of nuisance relates to the interaction of property rights and of course environmental protection.

Mr. WILKINS. Well, it has been a fundamental of American property law since the days of the Founding Fathers, that private right of property was always subjected to the greater public good in cer-

tain circumstances. And this was recognized in common law of nuisance that goes clear back to preconstitutional days.

And the U.S. Supreme Court has recognized in its most recent decisions that the law of nuisance is implicit in property right. What that essentially means is you don't owe—you don't have the right as a property owner to use your property in such a way that it constitutes a legal nuisance to the community.

Now, what constitutes a legal nuisance is a much narrower definition. I believe that many government regulators would want—I would guess that you would have a lot of government regulators that would want a very, very broad definition of nuisance. I think that you have to adhere rather closely to the old common law definition of noxious use.

But essentially if you can show that property owners are using their property in such a way that it does constitute a noxious use, then government can prohibit that noxious use without cost. It is when you go beyond noxious uses to securing positive benefits for the community, such as protection of turtles and acquisition of scenic easements, and all the other kinds of things we try to do by regulation. It is when you try to obtain those positive public benefits that this test will kick in and require that the public pay for those benefits.

The CHAIRMAN. Well, on the 33 percent line amount for partial takings, that arose out of a—that was a result of a number of discussions with various economists in the congressional budget office. It was believed that if we set the amount at less than 33 percent, that this would act as a disincentive for agencies to settle lawsuits.

Mr. WILKINS. May well be.

The CHAIRMAN. And they would just litigate forever because the Government has more power to litigate than the average citizen, or any citizen, for that matter. Setting it above 33 percent would be unfair to property owners. So we chose, you know, 33 percent is a pragmatic compromise. Personally I would like it to be a little lower than 33 percent. But right now most people who look at it say it is probably a good bright line to start with.

Mr. WILKINS. I think it is a pretty good bright line. In fact I—the clients—you know, I'm a law professor so I do not represent clients very often. But a couple of big cases, because I am a constitutional lawyer, and written in this area, I've been contacted by people in some big cases. And I'll tell you, the property owners in those big cases would have been vastly relieved.

What usually happens, from my experience, is you will take a piece of property that may be worth \$10 million—and just drawing hypothetical numbers out of the air—and as a result of government regulation, that \$10 million piece of property is suddenly worth \$80,000 or \$90,000. You are seeing diminishment in the range of 95 to 98 percent. And the courts are simply turning their backs and saying that doesn't go "too far." So anybody in that situation will be very relieved with the 33 percent line.

The CHAIRMAN. Well, I want to personally thank all six of you who have testified here today. It has been terrific to have you here. I know it has been a real inconvenience for you, but I think over the long run these type of hearings are what helps bring about change back there.

Now, this is a major change. The Supreme Court has not been willing to definitively resolve the problems and conflicts in this area. They tinkered at the edges, I agree with you, Professor Wilkins, some of the cases are very interesting and they've held out a lot of hope. As bad as the *Lucas* case was, it still held out some hope because at least it came part of the way, but a very, very limited part of the way.

And it's time to really have the national legislature resolve these problems because people are being torn a part by these problems only for their country. And as you can see, our three witnesses who have preceded you today, and some that you have mentioned here who have had great difficulties, really have not been treated fairly, and it is time to change that.

Now, there are many in the audience who wish to submit testimony. If there are, if you want to, anybody in the audience or anyone else, for that matter. We will keep the record open for 10 days and we would like you to mail your testimony. And we would love to have other illustrations to use for our callings back there. We have plenty of them, but we could use plenty more.

Send them to the Senate Judiciary Committee, 224 Dirksen Office Building—Senate Judiciary Committee, 224 Dirksen Office Building; Washington, DC 20210.

And I have to say, as chairman of the U.S. Senate Judiciary Committee, we are very, very concerned about this. And I think it is about time the Senate Judiciary Committee has been concerned about these issues. Because, you know, I hear all these arguments when we have Supreme Court nominations about the unenumerated rights that come out of emanations and penumbras, to borrow some of the Supreme Court language. These we are talking about are enumerated in the Constitution, they are there explicitly, and yet still the American people are not being treated fairly in many instances across the country.

So your testimony really has been important here today. We have made a record that I think is unparalleled and very important, and hopefully we can pass this bill, which would be of great benefit to our society and to everybody who believes in the right to own property, which is what has really driven the American dream through all of these last 200 years.

So this is an important hearing, for those of you who are not used to this, this is a hearing involving some of the most important principles of constitutional law that we have, and you're participating in it, and I for one want to express my gratitude to all of you who have come of interest or because you are suffering or because you just plain want to know more about what's going on in Washington and here.

I just want to thank you all, and with that we'll recess the Judiciary Committee until further notice. Thank you.

[Whereupon, at 11:15 a.m., the committee adjourned.]

THE OMNIBUS PROPERTY RIGHTS ACT OF 1995

WEDNESDAY, OCTOBER 18, 1995

**U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
WASHINGTON, DC.**

The committee met, pursuant to notice, at 10:01 a.m., in room 226, Senate Dirksen Office Building, Hon. Orrin G. Hatch (chairman of the committee), presiding.

Also present: Senators Thurmond, DeWine, Biden, and Simon.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

The CHAIRMAN. I want to welcome everyone here to this third hearing on S. 605, the Omnibus Property Rights Act of 1995. The theme of this hearing is the effect of the modern day regulatory state on the traditional notions of private property rights. More specifically, we will explore today how federal regulations, particularly environmental regulations, impact the private ownership of property. This impact is very real for the citizens of my home State of Utah and for each of the several States.

In recent decades, America has witnessed an explosion of Federal regulation of society that jeopardizes the private ownership of property with the consequent loss of individual liberty. Today, excesses in government planning and land use regulation threaten to seriously undermine the free market and the individual's use of private property, even when such use does not demonstrably harm a neighbor's property. In other words, excesses in land use regulations collectivize property by prohibiting the owners of their property the ability to use productively their property.

S. 605 was written to fulfill the promise of the fifth amendment that no property shall be taken by the Government except for public use and with just compensation to the property owner. This bill is a moderate measure designed to balance the public's need to protect the environment against the equally important need to protect private property rights. It codifies recent Supreme Court decisions and clarifies the meanings of sometimes confusing case law. Thus, "bright-line" standards are created that will guide the Federal agencies as to what constitutes a taking. This will aid the agencies in avoiding the promulgation of rules that will result in the need to compensate property owners. S. 605 in no way prevents the Government from promulgating regulations designed to protect public health, safety and welfare. What it does do is to assure, as required

by the Constitution, that just compensation be paid when the Government "takes" a property interest.

One of the myths that has been raised by opponents of this bill is that the bill pays polluters not to pollute. Put simply, this is nonsense. The common law has for untold generations recognized that the very definition of property did not include the use of property in a manner that directly interferes with others' property interests or in a way that damages public health, safety and order. This conception has been codified in the bill as a nuisance exception whereby no compensation may be paid if the Government demonstrates that the use of private property would constitute a private or public nuisance at common law. The nuisance exception is broad enough to cover all governmental bans on pollution. No one has the right to pollute the environment. We have excellent witnesses who will address this nuisance issue.

I am also pleased to announce the very significant news that the Congressional Budget Office has just completed a study of the costs to the Federal agencies of implementing S. 605. Released yesterday, this study first concluded that costs due to increased litigation under title II of the bill would not be substantial because large claims are already litigated under the Tucker Act and the majority of new lawsuits would involve relatively small claims. Moreover, litigation costs would deter many small claims.

Secondly, CBO also found that administrative compensation costs incurred under title V of the bill will, in the short run, increase due to the increase in small claims made possible by the bill. CBO estimated these cost would, but only in the short run, amount to between \$30 million to \$40 million annually. This is a far cry from the tens of billions of dollars estimated by the White House.

Finally, CBO opined that the reason compensation and administrative costs will decrease over time is that enactment of the bill would encourage agencies to avoid taking actions that would cause property owners to seek compensation. The fact that the bill draws "bright-line" standards as to what constitutes a taking, requires agencies to conduct impact analyses before regulating private property, and mandates that compensation be paid out of agency appropriations, was crucial to CBO in its estimation. This is the purpose, after all, of any property rights measure—the prevention of future violations of property rights.

I regret that I, personally, will not be able to stay for today's hearings. I am very grateful for Senator Thurmond's willingness to conduct these hearings because I have to be at some other mandatory meetings.

We have three distinguished Senators who will be making statements and five witnesses, who I am confident will discuss the issues thoroughly, but the schedule of the Senate being what it is, these other meetings will keep me from this one. So I am very grateful to Senator Thurmond and Senator Biden for being willing to go through with these hearings, and I will turn the gavel over to him.

But, first, we will turn to the distinguished Democratic leader on the Committee.

**STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR
FROM THE STATE OF DELAWARE**

Senator BIDEN. I thank you very much, Senator. I have an opening statement that will take a little bit of time, and I would ask unanimous consent that it be able to be put in the record so I don't take all of the time of my colleagues and the witnesses.

The CHAIRMAN. Without objection, so ordered.

Senator BIDEN. Let me say this is a very important hearing. I think that the vast majority of Americans have no notion of what this is all about and its potential consequences. It is staggering in its proportions. This is a fundamental debate about the takings clause of the fifth amendment and how it is to be interpreted, and it is something that I have had a great interest in for the last 8 years. The Chicago School of Law and Economics has made it one of the essential elements of their way, in my view, of turning the takings clause of the 15th amendment into the same tool that the liberty clause of the 14th amendment was used back in the teens, and the 1920's and the 1930's. It is of that broad of scope and consequence.

Let me say, as well, that I think that one of the things, and I put this in an overall context here, there has been an unrelenting, in my view, assault on the middle class in this country for a long-time, much of it unintended. This is one of those assaults, in my view. In the face of protecting property rights, this will have a staggering impact upon the average middle class taxpayer if, in fact, this law were to become law, this proposal.

There are a number of amendments in this bill, a number of sections, that I am going to be asking about, and my opening statement speaks to it. But let me just speak to the blanket response that comes from my friends and supporters who support this approach, and that is changing the constitutional jurisprudence of the takings clause interpretation is, in fact, nothing really new because we have this common law nuisance standard out there, and that if you are going to hurt somebody else's property by the way in which you use your property, there is this all-encompassing, long-standing protection out there that has been around and developing for over 800 years, and that is exactly what it is. The only protection left will be the common law jurisprudence State by State based upon the concept of nuisance.

As explained by my friend from Utah, a nuisance is anything that hurts somebody else and, therefore, if you are going to do something bad with your property, then the Government can stop you from doing it and not have to compensate you. That sounds fine on its face, except, hopefully, we are going to hear from people who have an expertise in the law in the Constitution today, and I will challenge them to tell me how that interpretation is accurate.

For example, the takings clause, and most people don't even know what we are talking about when we talk about the takings clause. Every American, if you ask them, "By the way, do you want government to be able to take your property and not pay you for it?" the universal response from me and everyone else is, "Absolutely not. If they are going to take my property, I want to get paid for it."

To oversimplify it, in the interest of time, the way in which the courts historically have looked at the takings clause of the fifth amendment is, hey, look, if you are going to take somebody's property, it better be for, first of all you have got to establish it is for an overall public purpose. You can't take my property and just give it to Senator Thurmond because you like Senator Thurmond better than you like me. You have got to prove it is for the common good. You are taking it for some better reason that is going to benefit the whole society.

The second thing it basically said was, but if, in taking my property; that is, making me pay money to do something with my property to stop some actions occurring beyond my property, or if, in fact, you are taking my property by telling me, for example, I cannot build a seven-story building in the middle of a neighborhood that says there is zoning and only allows no buildings over 5,000 square feet, that fell under the rubric of the police power, where the Government has the right to come forward and say, "Look, we have a right to protect the public health and safety," and I hope the press is listening to this, too, because, in fact, the way the press looks at this, understandably, is like the rest of us. They are not experts in constitutional law, most of them. Some who cover this will be.

But it has been the basic police power. So the court has said, look, when you come along and you are restricting the use of someone's property, if it is for the public health and safety and the good of folks out there, then the court will give wide deference to the legislative body and governmental body that sets out the standard.

For example, if you say in the middle of your residential neighborhood you can't build a 20-story building, the reason you can't build a 20-story building is not just for aesthetic reasons. It will increase traffic. It will create sewer problems. It may cause kids to get hit on bicycles because of the traffic pattern in the neighborhood. It may cause a whole range of other things.

The court does not require, at this point, any State or the Federal Government to quantify and prove a direct injury to somebody else. It says, "As long as there is a reasonable basis for this standard, we are not going to, basically, second guess it."

What this will do is fundamentally change that jurisprudence in every way, fundamentally change that jurisprudence. Now let me just give you, in summation here, a little bit of what nuisance law is about. The nuisance law, generally, covers immediate demonstrable harm, rarely addresses actions whose health and safety risks are long term, so it might very well not be a nuisance to discharge toxins into the water or air because they don't cause identifiable harm to an individual tomorrow. The damage will occur over a few years. That doesn't meet the requirement in this law that it is a nuisance.

Similarly, nuisance law does not address problems of cumulative harm, where, say, many low-level pollutants create a harm that none alone would cause. Also, a nuisance, generally, must be substantial and continuing, making nuisance laws often inapplicable to one-time intermittent pollution. Nuisance law does not protect the particularly sensitive, such as pregnant women, children, senior

citizens. Yet some environmental toxins like lead are primarily harmful only to such sensitive individuals in certain circumstances.

Finally, since nuisance law varies from State to State, the nuisance exception could lead to varying degrees of compensation or environmental protection from one State to another.

Let me just give you a few examples, so we have this, at least from my perspective, in focus. There are a few real-world examples how State nuisance laws have proven inadequate to prevent environmental harm or protect public health and safety. *American Glue and Resin, Inc. v. Air Products and Chemicals*, 835 Federal Supplement 36, Massachusetts, 1993. In Massachusetts, contamination of one's own property does not constitute a nuisance, even if spilled chemicals enter the ground water and migrate into a neighbor's property. That is Massachusetts State's nuisance law 1995.

In Maine, filling a portion of a property with a barrier to water drainage is not a nuisance to an adjoining property, even though it interferes with the drainage on the adjoining property because this is a reasonable use of the law, *Johnson v. Whitten*, 1978 case, directly analogous to wetlands regulation.

Just two more examples and I will stop. In New York, a cement plant, which created offensive noise, white powder and pollution by unlawfully discharging waste materials into a bay adjoining a residential neighborhood was not a nuisance because the cement plant's actions did not rise to the high state standard for nuisance; that the interference was intentional, negligent or reckless or was abnormally dangerous activity. That is *Benjamin v. Nelstand Materials Corporation*, a 1995 case.

In Maryland, a current tenant under Maryland law does not have a cause of action in a nuisance against a former tenant for contamination of property that occurred prior to the current tenant's taking possession.

There are many other aspects of this law that we should discuss here. We will discuss. But, for example, the definition of what constitutes property and changes in contract law. If there is a contract that is changed, is it a "taking"? For example, we have contracts, as the distinguished Republican Senator from Rhode Island and Democratic Senator from Vermont and the committees they chair, know. Big debates over what contracts for water that Western farmers get Federal water projects. We changed that contract. Does that require compensation? That is a definition of a taking of a property, as I read this, or public housing tenants. We raise the rate that we charge them. Do they have a cause of action? Is that a taking under this legislation?

So this is incredibly far-reaching, but the bottom line is this, in my view; that when you change the definition of what property is and what a "taking" is, as this does, and then say the safeguard is common law nuisance, what you have fundamentally changed is what the court has historically said, and that is, under the takings clause of the fifth amendment, as long as the legislature has acted in a reasonable way to protect the health and safety of the folks out there, it is not a takings. It is a legitimate regulation. You fundamentally change that, and I don't care what studies you show, you cannot convince me, and there is another study I would like to introduce into the record from the Office of Management and

Budget as to what the cost of this would be, you cannot convince me that this would not be a problem.

The ozone layer is depleted by CFC's. No one argues about that now. Assuming we passed a law here saying nobody can emit CFC's any more, no manufacturers can into the air, under common law nuisance standard, you would have to prove that I got cancer from the CFC that was emitted from Company X that went up through the ozone layer, depleted the layer, the sun then and ultra-violet rays came down and caused me to have cancer. Try it. Try it.

Consequently, if you can't prove that, then you have to compensate each of these companies for not emitting CFC's into the air because you are taking their property. What is that; \$100? \$100 million? A billion dollars? \$10 billion? \$30 billion?

I am really anxious for this hearing to get underway, so I will stop. Thank you.

Senator THURMOND [presiding]. Well, Professor Biden has presented his view. [Laughter.]

Senator BIDEN. I have. Thank you, Senator.

[The prepared statement of Senator Biden follows:]

PREPARED STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.

Let me begin by identifying the point on which we all agree: The property rights of all Americans must be respected. Indeed, I believe that the right to property is a core foundation of our society—and an essential attribute of a robust and free economy.

Nevertheless, I part company with the supporters of the bill the committee is now considering. For I believe it is a radical and unwise departure from 200 years of constitutional thinking on this issue.

The fifth amendment to the constitution says that:

No private property may be taken for public use without just compensation.

This means that if the Government "takes" your property—either outright in a condemnation proceeding or through regulation—it must pay you. And it must pay you fairly.

The fifth amendment does not say, however, that the Government is powerless to affect property for the community good—or that any such action on behalf of the community must result in payment to the property owner.

Quite to the contrary: The right to property has always carried with it the corollary responsibility *not* to use property in a way that hurts a neighbor or the general public.

And it has long been considered one of government's chief responsibilities to regulate property use for the public good. As the supreme court long ago said:

We think it a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that use of it may be so regulated that it shall not be injurious * * * to the rights of the community.

I believe that the bill before us is based on the exact opposite premise: That a property owner has a near absolute right to the greatest possible profit from his property—without a fair regard for the consequences to others or to the public generally.

Though I agree that property rights should—and must—be protected, I disagree that they should be given the kind of super status they would be accorded under this bill.

The question of what constitutes a "taking" under the fifth amendment has occupied the minds and talents of many a Supreme Court Justice for more than a century. Over the years, the court has declined to articulate a bright line rule—and has instead articulated broad principles and insisted on a careful, fact-specific balancing of the different interests at stake, both private and public.

This flexible balancing required in takings cases recognizes *both* that we should be able to put our property to personal and profitable use, *and* that we have a corresponding responsibility not to exercise property rights in ways that hurt others.

The bill before us would change all that. It does away with the careful balancing of interests, and instead, substitutes a mechanical rule of compensation that elevates individual property rights over the community welfare.

Among other provisions, the bill says that the Government—and let's be clear, that means you and me, the taxpayers—must pay the property owner if a regulation results in a 33 percent loss-in-value to any portion of property—regardless of the property owner's legitimate expectations:

- Regardless of the profitable use of the property as a whole, and
- Regardless, even, of the potential harm that a proposed property use might cause others.

This is a revolutionary idea. First, it says what not even the most pro-property rights justices on the Supreme Court—like Justices Scalia and Rehnquist—have ever said: That a loss of property value, standing alone without regard to other factors, is enough to trigger compensation.

What's more, the Supreme Court has consistently made clear that, in assessing regulatory burdens on property, we should look to the property as a whole, rather than segmenting it into smaller parts.

This is only fair: A regulation that limits the use of part of a property, like a setback rule, is fair to both the neighbors and to property owners. Similarly, a regulation that only restricts the use of a fraction of a larger parcel still leaves the property owner with land that's productive and profitable.

But this bill would give a property owner a right to compensation when a regulation impacts a *portion* of the property. Think about that for a minute: Once property or a property right can be segmented into portions, *any* loss in value can be manipulated to become a 100 percent loss—and easily a 33 percent loss.

The scope of this bill should not be underestimated—for it also goes beyond mere land-use restrictions and covers the waterfront of environmental, public safety and civil rights regulations.

Suppose the FDA, thanks to some new research, determines that a drug out on the market poses some serious health risks. When the FDA bans the drug, its manufacturer is going to have a lot of useless inventory on its hands. Should we have to compensate the manufacturer for its business losses?

After we passed the Americans With Disabilities Act, some restaurants have had to expand their restroom facilities to accommodate wheelchairs. Suppose the renovation means that the restaurant loses some table space. Should we have to compensate the restaurant for its losses?

And what about pollution. When the Government sets air or water quality standards, compliance by industry can be expensive. Should we have to pay those companies not to pollute?

I say "no." But the bill before us could very well mean that in the future the answer will be "yes."

In the 1960's, there were those who argued that our landmark civil rights laws unreasonably restricted their property rights. These segregationists argued that if the Government was going to require integration—and thereby reduce their property values—then it should pay them to do it.

I am proud to live in a place where the highest court in the land rejected such a claim. And it is with that proud tradition in mind that I oppose this takings legislation.

If this bill becomes law, I believe that we will be faced with two equally untenable options. Either we'll have to cut back on health, safety, environment, and civil rights protections; or we'll have to pay up—we'll have to pay employers not to discriminate, pay companies to ensure worker safety, and pay manufacturers not to pollute.

Indeed, the cost estimates that have accompanied the various takings proposals before the Congress are breathtaking. The office of management and budget has estimated that the narrower house-passed takings bill—which covers only certain environmental regulations—would cost the taxpayers \$28 billion over the next seven years.

OMB says that this bill, which is much broader, would be several-fold more expensive.

Let me also say: The vast majority of property owners in this country are folks like my parents—individual homeowners. These are people who have invested in a house, signed a mortgage note, and made a commitment to a particular community.

Our civil rights laws, our health and safety laws, our environmental laws all contribute to the property values of our homes. For it is clean water, clean air, and safe land management that make our property more valuable.

If these laws are rolled back—which is what I believe is the ultimate purpose of this takings legislation—homeowners will be the real losers.

There is a better way. Instead of trying to rewrite the constitution, we should focus on specific laws placing unreasonable burdens on property owners and make necessary changes to those laws.

The current administration appears to be well on the way to doing just that. For example, it is already taking steps to relieve most homeowners from certain requirements of the Endangered Species Act and wetlands regulation.

As the committee considers this legislation, I will continue to raise these concerns. I look forward to discussing the issues with our witnesses this morning, and I join Chairman Hatch in welcoming all of you here.

Senator THURMOND. I would just like to emphasize two points here; the importance of protecting private property and the significance of the low CBO cost estimate.

The protection of private property is a fundamental right which stands beside our most treasured liberties in the Bill of Rights. Yet some are satisfied to let this basic liberty go without solid protection. I am not. I support S. 605 because it creates a fair and balanced opportunity for Americans to defend their rights against an ever-increasing Federal bureaucracy.

There have been a number of attacks against this bill, which are simply not accurate. All along we have said that the Administration's inflated cost estimate was based not on economics but on politics. Now we have the proof. The neutral arbiter of budgetary questions, the Congressional Budget Office, has estimated the cost of this bill to be a tiny fraction of what the Clinton administration claims.

I look forward to disproving any other arguments against this bill as clearly and decisively as the CBO letter disproves this one.

I ask unanimous consent that the CBO letter be placed in the record at this point.

[The CBO letter follows:]

CONGRESSIONAL BUDGET OFFICE,
U.S. CONGRESS,
Washington, DC, October 17, 1995.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, DC.

DEAR MR. CHAIRMAN: At the request of your staff, the Congressional Budget Office has prepared the enclosed cost estimate for S. 605, the Omnibus Property Rights Act of 1995.

Enacting S. 605 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL,
Director.

October 17, 1995

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. BILL NUMBER: S. 605
2. BILL TITLE: Omnibus Property Rights Act of 1995
3. BILL STATUS: As introduced on March 23, 1995

4. BILL PURPOSE

S. 605 would codify the constitutional prohibition against the taking of private property without paying just compensation to the owner. The bill would establish specific conditions, definitions, and standards to be used in determining when an agency action has caused a taking of private property and what compensation is due to the owner.

Two titles of this legislation would make it easier and less expensive to pursue claims for compensation against the United States. First, Title II would establish a statutory right to judicial redress that could be used by owners to sue the government when property rights may have been taken by the activities of a federal (or authorized state) agency.

Second, Title V would establish special rules for resolving property rights disputes that involve federal programs carried out under the Endangered Species Act (ESA) and section 404 of the Federal Water Pollution Control Act (FWPCA). This title would amend the two statutes to provide landowners with a right to appeal and/or seek compensation for agency actions through a new administrative process.

Other provisions of the bill would require agencies to consider and minimize the effects of their actions on private property rights. For example, Title IV would require agencies to conduct impact analyses before taking actions that are likely to affect private property. Agencies could not promulgate final rules that would result in uncompensated takings. Where existing regulations are found to be in conflict with the new law, agencies would have to issue new regulations. Similarly, Title V would require agencies to administer programs carried out under the ESA and FWPCA in a manner that has the least impact on the rights of property owners.

Finally, the bill would require that all compensation payments to property owners be paid from funds appropriated to the agency that caused the taking. This requirement would apply to all payments (including any awarded interest and cost reimbursements), whether determined by court judgment, settlement, arbitration, or administrative decision.

5. ESTIMATED COST TO THE FEDERAL GOVERNMENT

Implementing S. 605 would involve two types of federal expenditures: (1) payments of compensation to property owners, and (2) operating and administrative expenses incurred by federal agencies.

Payments of Compensation. CBO expects that additional payments of compensation over the next few years would probably be less than the additional administrative costs (discussed below) because most of the cases that would be resolved during this period would be small administrative claims involving minor dollar amounts. CBO has no basis for estimating the additional amounts of compensation that the government might have to pay for cases where property owners choose to pursue larger claims in court.

Administrative Costs. Assuming appropriation of the necessary amounts, CBO estimates that federal agencies would spend an additional \$30 million to \$40 million a year over the next five years to implement and operate the administrative appeals and claims procedures prescribed by Title V. After this period, additional ongoing administrative expenses would fall. In addition to these costs, federal agencies would incur additional administrative expenses to conduct takings impact analyses and to develop new guidelines and practices for ongoing regulatory activities. Also, some agencies would incur new operating costs to manage land or other property interests acquired as a result of takings. CBO has not completed its estimate of these other costs, which could be significant for some agencies.

6. BASIS OF ESTIMATE

Payments of compensation

In the first few years following enactment of S. 605, additional costs of compensation resulting from the legislation would probably account for a relatively small portion of each affected agency's operating budget because few claims would be paid over this period and those that would be paid would typically involve small awards. The cost of compensating property owners in the longer run is very uncertain and would depend on a number of unknown factors, including how property owners and federal agencies would react to the legislation and how the legislation would be interpreted by the Administration and the courts.

CBO expects that enacting the bill would cause federal agencies to attempt to avoid paying compensation by modifying their decisions, processing permits more quickly, or otherwise changing their behavior. Although the number of small claims brought against the United States could increase dramatically—especially since so

few are made under existing law—those that are paid would involve small awards. We expect the increase in the number of large claims to be much less significant, because most such claims would probably have been brought anyway and would still require litigation, but the bill could increase the chances of success for those who choose to litigate.

Compensation under Current Law. Under existing law, persons who wish to seek compensation for property that they believe has been taken by a government action usually must do so through litigation—generally in United States Court of Claims. The process is time-consuming and expensive. Property owners who bring suit in the Claims Court typically wait at least two years before their cases are heard. Decisions unfavorable to the government have been rare in the past because of the high loss thresholds required by precedent before the courts will award compensation. Property owners who pursue their cause can expect the government to appeal unfavorable decisions, which often adds years to the process. Because the legal and other costs of waging a protracted court battle are greater than most property owners can afford, relatively few compensation claims are brought against the United States (although there has been a steady increase in the last decade). Those cases that are brought typically involve relatively large claims (more than \$100,000, to more than \$100 million) brought by corporations or other large property owners. Such claims can require more than a decade to resolve. As a result, the few awards that are paid often include more money for interest and reimbursements of litigation costs than for compensation.

Compensation Under S. 605. CBO expects that the vast majority of new compensation claims resulting from this bill would be brought under the administrative process prescribed by Title V. Although the number of such claims could be quite large at first, we expect that relatively few would result in payment because:

- The bill's effective dates, definitions, and other provisions would probably allow agencies to reject a large portion of early claims (such as those involving pending or pre-enactment agency decisions) by deeming them to be outside the scope of the bill;
- The requirement that compensation payments be made from agency appropriations would cause the agencies to try to resolve as many claims as possible without having to pay any compensation—for example, by reversing or modifying permit decisions or enforcement actions, by processing permit applications more quickly, and by working more closely with landowners to negotiate permit conditions; and
- The 33 percent threshold established by the bill for determining whether a taking has occurred would probably be too high to allow property owners affected by many agency actions to recover. Especially for agency actions that apply to an area generally (such as those taken under the ESA), the overall percentage of value lost on an affected property typically would be small.¹

Further, we estimate that any compensation payments eventually made through the administrative process would involve relatively small amounts (often as little as a few thousand dollars), largely because small claims would account for the vast majority of claims likely to be made under this title. Most of the actions that would lead to successful claims under this title (such as decisions on permit applications) involve either very small land parcels or some minor fraction ("affected portion") of larger tracts.² Moreover, we believe that property owners with large claims would be very unlikely to seek compensation under Title V. Because disputes involving large claims almost always involve complicated technical and valuation issues, they would be much more difficult to resolve under the simple administrative procedures established by Title V. Also, the administrative and binding arbitration processes prescribed by this title do not specifically allow claimants to receive interest on their awards or be reimbursed for legal and other costs. Consequently, it would be very

¹ For example, an individual species listing or habitat determination under the ESA can affect thousands of properties ranging in size from single residential lots to major timber holdings, most of which are likely to experience some overall reduction in market value across the property as a whole. In most cases, however, the average diminution in property value (or business loss, in terms of new compliance costs) would be well below the 33 percent threshold.

² For example, of the types of section 404 permit decisions that are likely to result in compensation claims, about one-half involve fill sites of less than one acre, and as many as 75 percent involve fewer than five acres. Even if the Corps had to treat each such denial as a 100 percent loss of value for the entire fill acreage, most payments would be minimal. Moreover, a significant number of section 404 permit decisions cover fill sites that could be too small either to reduce the value of the owner's total holding by 33 percent or to have any market value independent of the property as a whole.

risky for owners with large claims to proceed under Title V. Such claims (which are often brought by corporations and others who have sufficient resources to sue the federal government) would probably continue to be resolved through litigation.

CBO expects that new claims for compensation also would be brought under the right to judicial relief established by Title II of the bill, although we expect that any budgetary impact resulting from new litigation would take several years to be felt. Title II specifies the events and conditions that constitute a compensable taking of private property and the standards to be used in calculating just compensation. Compensation awarded under this title would include compound interest calculated from the date of the taking until payment and reimbursement for litigation costs, including legal expenses and expert witness fees.

Enactment of Title II probably would increase the number of lawsuits brought against the United States, at least in the short run. CBO expects that the majority of the new suits would involve relatively large claims against agencies that regulate the use of land or water, particularly the U.S. Army Corps of Engineers and the Department of the Interior (DOI). The impetus for most of these claims would be the new statutory conditions for identifying a compensable loss.

Even if the government would ultimately lose more lawsuits as a result of the legislation, additional compensation costs would probably be minimal in the 1996–2000 period because claims would take several years to resolve. Large claims brought under Title II would still involve many of the same factors that prolong litigation under existing law, including a lengthy discovery period, court delays, and valuation disputes. Moreover, in the early years many new claims would likely involve conflicting interpretations of the statute that could take a number of years to resolve through the judicial process.

The effect of Title II on federal compensation costs in later years would depend on the outcome of this process and is very difficult to predict. On the one hand, it is likely that the legislation's 33 percent loss threshold and related provisions would cause property owners to bring—and possibly win—more suits than in the past. On the other hand, the requirement that agencies pay all compensation awards, including compound interest and reimbursements of costs, from their operating budgets could have the effect of limiting potential costs under this title. We expect that this requirement would encourage most agencies to avoid actions that would cause property owners to sue, to the greatest extent allowed by applicable law.

Administrative costs

Over the first few years following enactment, the major impact of S. 605 would be on federal administrative costs incurred to implement Title V. This title would direct the Corps of Engineers, the Environmental Protection Agency (EPA), and the U.S. Fish and Wildlife Service (USFWS) to institute administrative appeals procedures to allow property owners to request a review of agency decisions on wetlands and endangered species matters.³ Property owners could also seek compensation administratively, if a final agency action deprives them of 33 percent or more of their property's value or economic use.⁴ Under current law, property owners must pursue both types of requests through litigation.

CBO estimates that federal costs to administer the two affected statutes as amended by Title V would be significantly greater than under current law, at least in the first few years following enactment of the legislation. During this initial period, addressing previous harms to property owners would account for the lion's share of new expenses. In order to take advantage of the administrative appeal and compensation provisions of S. 605 (which would apply only to agency actions that take place after enactment), persons affected by past government actions would have to apply or reapply for permits to obtain a new agency decision. As a result, the affected agencies would probably experience a one-time flood of such requests beginning soon after enactment. Processing applications and reapplications would require the agencies to revisit hundreds of old decisions made over the years since the two statutes were enacted. Moreover, once the resubmitted permits have been processed, each unfavorable decision could form the basis of an appeal and/or compensation claim that also would have to be resolved.

The Corps of Engineers would probably incur most of the additional workload because it processed the vast majority of individual permits that would probably be

³The appeal and compensation provisions of this title would apply to a broad range of regulatory, enforcement, and conservation activities carried out under the two acts, including (1) actions that apply to individuals or groups of property owners, such as permits to fill wetlands under section 404 or incidental take permits issued under the ESA, and (2) general, area-wide actions that affect more than one property owner, such as listings of endangered or threatened species and designations of their critical habitat under the ESA.

⁴As defined by Title V, "property" includes water rights, land, and related interests.

resubmitted as a result of this bill. Moreover, we would expect relatively few landowners affected by previous ESA determinations to take advantage of the appeals and claims provisions of Title V because in order to do so they would probably have to apply for an incidental take permit and obtain an unfavorable decision from the FWS. Incidental take permits, which must be obtained in order to develop land subject to ESA regulations, are very expensive and time-consuming for the average small landowner to pursue.

Depending on how quickly the reapplications arrive and what priority the agencies give them, processing permits and other requests related to these previous actions would add \$15 million to \$20 million annually to the cost of administering wetlands and endangered species programs in the short run.

In addition to these amounts, federal agencies also would incur new annual expenses to process administrative appeals of decisions made after enactment of the bill. Most of the additional costs of processing appeals would be incurred by the Corps under the section 404 wetlands program because it makes the greatest number of decisions that are likely to result in such requests in any given year. CBO estimates that the agency would spend about \$12 million annually to process appeals under Title V, or about twice as much as the \$6 million requested for a similar (but more limited) administrative relief system proposed by the President in the fiscal year 1996 budget submission. The cost of the ESA appeal process would probably be much less—about \$3 million annually—because the USFWS issues far fewer decisions each year and would be able to consolidate individual appeals of many of its decisions.

Finally, beginning in 1996, both agencies would incur new costs to process compensation requests. CBO believes that the majority of such claims would stem from the creation of an administrative forum, which would provide most property owners with a cost-effective way to seek compensation. Typically, persons affected by wetlands and endangered species regulations are small landowners who often cannot afford to sue the federal government or who would not expect to receive enough compensation to justify the substantial expense of attorneys and experts. Thus, without the administrative claims process prescribed by Title V, most of these people would not be able to take advantage of the 33 percent loss threshold or other standards established by the bill that might increase a landowner's chance of prevailing against the government.

We estimate that annual costs to process compensation claims would be \$1 million to \$2 million for the first few years after enactment, rising to about \$5 million by 2000. About half of these amounts would be spent by each of the two agencies.

7. PAY-AS-YOU-GO CONSIDERATIONS: None.

8. ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS: We have not completed our analysis of the costs to state or local governments.

9. ESTIMATE COMPARISON: None.

10. PREVIOUS CBO ESTIMATE: None.

11. ESTIMATE PREPARED BY: Deborah Reis (226-2860).

12. ESTIMATE APPROVED BY:

PAUL N. VAN DE WATER,
Assistant Director for Budget Analysis.

Senator THURMOND. We will begin today's testimony with the distinguished Chairman of the Environment and Public Works Committee. I welcome you, Senator Chafee, and he will be joined by the ranking member on the Agriculture Committee who, of course, also serves with distinction on this Committee, and I welcome you as well, Senator Leahy.

Senator Chafee?

STATEMENT OF THE HON. JOHN H. CHAFEE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Thank you very much, Mr. Chairman, and Senator Biden and friends all here today. I appreciate this opportunity to appear before your Committee.

As chairman of the Committee on Environment and Public Works, I have grave concerns that property rights bills such as S.

605, if enacted, would undermine severely many of the most important protections provided by our environmental laws.

I think it is worth reminding ourselves, Mr. Chairman, just what is at stake. The accomplishments of Congress over the last 25 years in improving the Nation's environment have been nothing short of remarkable. A marvelous illustration of our success was demonstrated just last week. Just a little bit of background.

During the 1980's, Mr. Chairman, the Committee on Environment and Public Works began a careful and searching examination of the effect of chlorofluorocarbons, CFC's, on the ozone layer. The ozone is a thin layer in the stratosphere that helps to shield us from the sun's harmful ultraviolet radiation. Such radiation can cause deadly skin cancer, cataracts and an assortment of other health and environmental damages.

After a series of hearings under republican and democratic administrations, under republican and democratic committee chairmen, and in the face of considerable skepticism, the committee concluded that CFC's were destroying the ozone layer. We then worked hard, in conjunction with the Reagan administration, to approve international standards providing for the eventual ban of CFC production under the 1987 Montreal protocol.

Later, these amendments were strengthened in 1990, as part of the Clean Air Act. All during this effort, there were those who called the ozone hole and the destructiveness of CFC's mere myths. One week ago today, Mr. Chairman, our actions were vindicated beyond question when the three scientists who first alerted us to the possibility that CFC's were destroying the ozone layer were awarded the Nobel Prize for Chemistry.

I raise this example, Mr. Chairman, to remind all of us that we should be proud of our strong and bipartisan record of environmental legislation which has helped to make this world a better, cleaner, healthier place to live. The environmental statutes we have passed have led to tremendous progress in the way we care for the air we breathe, the water we drink, and the natural wonders we enjoy.

Given that some are suggesting we could do better without such laws, let us remember what environmental conditions were like prior to congressional intervention. It was the ongoing discovery of new examples of environmental degradation that led us to respond with legislation in the first place.

The point, Mr. Chairman, is that environmental laws we have enacted have served us well over the past 25 years. Consequently, we should tread carefully when considering legislation that poses a threat to the many good things those laws helped us to achieve.

Let me hasten to add that protection of private property is crucial to our society. I recognize that. It has been a cornerstone of our democracy in this country since the Framers of the Constitution, included the takings clause in the fifth amendment. The issues your committee are addressing, Mr. Chairman, are indeed significant.

I have a good deal of familiarity with them because the Committee on Environment and Public Works also has held hearings on property rights proposals with regret to environmental laws.

Several points came through from those hearings. First, testimony offered during our hearings indicated that today's environmental regulations sometimes can, and do, go too far. Affected landowners voiced concerns about delay, uncertainty, and a general lack of accountability for agencies implementing these regulations. Some environmental regulations and programs have become too rigid, and bureaucratic.

Second, the hearings demonstrated that making improvements in the way we protect private property and the environment is not susceptible to simple, one-size-fits-all solutions. Unfortunately, most of the current property rights proposals reflect just such an approach. In other words, they fit into the one-size-fits-all category.

One proposal is especially troubling. It is the provision in S. 605 that would create a brand new statutory right to compensation whenever a regulation diminishes the value of property by 33 percent. Some have tried to characterize this provision as nothing more than a codification of the constitutional takings clause. If that were the case, one might well ask, "What is the need for it?"

In reality, the compensation provision in S. 605 represents a dramatic departure from the careful balance reflected in the takings clause. That balance, crafted by Framers of the Constitution, and fine-tuned for more than 100 years, should not lightly be tossed aside. An example of how the compensation provision deviates from the Supreme Court interpretation of the takings clause is how it would affect diminution in property value.

In reviewing takings claims, the court always has calculated reduction in property value by looking to how the Government regulation affects the entire parcel. Directly contrary to that approach, S. 605 calls for use of the Affected Portion Rule. That rule provides that, in determining whether there has been a 33 percent reduction in value, you consider only the portion of the property directly affected by the regulation. Thus, even if a government action affected only 1 acre of a property owner's 100-acre parcel, the reduction in value would be measured by looking to the impact of the action solely on the one affected acre. It is hard to imagine how the 33-percent compensation threshold would ever not be triggered under such a rule. Indeed, the threshold virtually always would be triggered under the affected portion provision S. 605.

S. 605 also ignores the fact that environmental regulations serve to enhance property values. Examples abound. A regulation constraining a industrial plant's toxic emissions obviously serves to increase the value of properties that are downwind.

Similarly, regulations prohibiting the destruction of wetlands in a floodplain improve the property values of owners downstream. Now, do we ask those beneficiaries of environmental regulations to compensate the Government for the value added to the property by the regulation? Of course not.

Another point. Sometimes government action will impose a limitation on the use of property as part of the give-and-take that comes with living under a democracy. As Justice Holmes said in *Pennsylvania Coal v. Mahon*, "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law."

We are not entitled to compensation every time the Government restricts the use of our property to protect other landowners or the community at large.

With respect to the nuisance problem, Mr. Chairman, S. 605 seems to be based on the notion that a landowner should be able to do whatever he wants on his property, regardless of consequences. Such a notion, however, is inconsistent with the entire history of property law in this country. No rights, even in the Bill of Rights, are absolute. S. 605 would give rise to situations where we would have to pay people not to pollute. It is no reassurance to hear that S. 605 contains the so-called "nuisance exception". This is the matter which Senator Biden addressed previously. The exception provides that compensation shall not be due if government action is to prevent a nuisance. But courts have found contamination of groundwater and dumping of toxic waste not to be a nuisance. In fact, it was largely due to the inadequacy of nuisance law to protect against environmental harm that gave rise to all or many of the environmental protections we have today.

Mr. Chairman, my remarks are not, in any way, to belittle the importance of property rights. The fifth amendment upholds such rights. However, it is clear to me that enactment of S. 605 or other similar compensation legislation would be a mistake. The far preferable way to proceed is to amend individual environmental statutes, not by adding a new statutory right to compensation, but by making each of these statutes more user-friendly and flexible for affected property owners.

In that regard, I want to report that the Environment and Public Works Committee is doing just that. We have held hearings on reforming a variety of statutes, including the Endangered Species Act, Superfund and section 404 of the Clean Water Act.

Legislation to reform each of these statutes is under active consideration. We will look for ways to minimize the effects of environmental laws on property owners while maintaining a strong level of environmental protection for our Nation.

Our goal is to ensure that a property owner is not unfairly asked to forego the fruits of his investment or labor, on the one hand and, on the other hand, also to ensure that the Government can protect the welfare of other property owners and the environment we all share.

Thank you very much, Mr. Chairman.

Senator THURMOND. Thank you, Senator, for your testimony.

Senator CHAFEE. If I could be excused, Mr. Chairman, I would appreciate it. We have a hearing in the Finance Committee.

Senator THURMOND. Certainly.

Senator CHAFEE. Thank you very much.

Senator THURMOND. Senator Leahy?

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. It is good to be here, both as a member of the Committee and as a witness testifying. I would ask also, because I think it is important for the moral issues they raise, that the testimony of the Catholic Bishops also included in the record.

Senator THURMOND. Without objection, so ordered.
[The testimony of the Catholic Bishops follows:]

PREPARED STATEMENT OF MOST REVEREND JOHN J. McRAITH ON BEHALF OF THE
U.S. CATHOLIC CONFERENCE

INTRODUCTION

I am Bishop John McRaith, the bishop of Owensboro, KY, and offer this testimony on behalf of the U.S. Catholic Conference, the public policy agency of the U.S. Roman Catholic bishops. I serve as a member of the USCC's Domestic Policy Committee and Chair of the Subcommittee on Food, Agriculture, and the Environment.

I offer this testimony not as a partisan or as an ideological combatant, but as a pastor and religious teacher. I represent a religious tradition that affirms the principle of private property, focuses on the common good and assesses policies for how they touch the life and dignity of the human person.

I present this testimony specifically because of our concern that the takings issue, which raises fundamental value questions about how we balance the moral goods of private property and the common good, is being debated in a very polarized atmosphere. In our judgment, a series of false choices has been created. Some aspects of the public debate seem to either characterize all regulations and the government as unneeded, inept, and meddling or all private property interests as only self seeking. Like any false choice, these exaggerated caricatures risk opening up damaging fractures in society, particularly in local communities.

At the outset, we urge lowering the volume, restraining the righteousness and rhetoric on all sides and returning to search for common sense, the common good, and common ground on this vital issue.

We recognize the legitimacy of the need to balance the concerns of private property owners with the collective good of society as a whole. We also realize the complexity of the task. We do not come to provide a technical solution but rather to offer an ethical context and some modest measures to address the issue. While regulatory problems exist and practical solutions must be found, we are concerned that S. 605, *The Omnibus Property Rights Act of 1995*, will create an unneeded and sweeping new legal regime which could diminish current governmental protections of the environment, health, and safety. Therefore, we urge you to take a more measured examination of this issue without rushing into a quick fix for a complicated problem.

The underlying debate over takings is about values, attitudes and interests. It is about what type of society we want to be. Pope John Paul II has observed a sense of "crisis within democracies themselves, which seem at times to have lost the ability to make decisions aimed at the common good." There is a "growing inability to situate particular interests within the framework of a coherent vision of the common good."¹ Will our society move more toward extreme notions of the individual where "private rights" become a wall of separation from others and a rejection of responsibilities for the common good; or will we choose to be a society where "private rights" are seen as a way to participate in a common effort to build a society of true freedom and justice? Will excessive regulation ignore the economic and other consequences of administrative judgments which can hurt families and other entities, or will regulation serve to protect the environment while at the same time enhancing the economic and social vibrancy of local communities?

In addressing takings, we would like to:

- (1) provide some elements of a moral framework for analyzing the rights and responsibilities of private property owners in relationship to other neighboring private property owners and to the common good, and the role of government in balancing these rights and responsibilities;
- (2) apply this framework to help analyze the takings issue in general and S. 605 in particular; and
- (3) offer several suggestions for addressing the underlying concerns in a more reasoned and common sense manner.

MORAL FRAMEWORK FOR CONSIDERING THE TAKINGS ISSUE

We offer from our Catholic tradition a moral framework for considering the rights and responsibilities of private property owners to other owners and to the common good. In this regard, we wish to make three major points:

¹ Pope John Paul II, *Centesimus Annus*, #47, May 1, 1991.

- (1) private property is a moral good, though a limited one entailing responsibilities as well as rights;
- (2) in promoting the common good, government plays a necessary and legitimate role in balancing the private and public dimensions of the common good for the benefit of the entire society, the wider human family and future generations; and
- (3) with respect to public health and welfare, safety, and the environment, government has special responsibilities because unrestrained private efforts and market forces sometimes do not promote the common good, especially as it relates to regional and global problems and our responsibilities to future generations.

(1) *Private Property and the Common Good.* As moral concepts, private property and the common good share an origin in the doctrine of the common purpose of creation. Both private property and the common good are necessary to human flourishing and progress. While property rights look to the flourishing of individuals or small groups, the common good is directed to the flourishing of whole societies, of the wider human community, and indeed the whole of creation.² Property rights serve as an essential guarantee that individuals, families, and other groups have a share in the fullness of God's creation. As an entitlement, private property helps to insure that individuals have a stake in the common good of creation itself. Promotion and protection of the common good help insure that the needs of the public are met in a way that the whole of society has a stake in the benefits and burdens of caring for the common good.

Thus, legitimate ownership and the proper use of private property is a clear moral good. It is, nonetheless, a limited good conditioned by its contribution to the common good, namely, the flourishing of the whole society. Pope John Paul II, reiterating the Church's traditional teaching, places private property and its use in a well-ordered framework when he states that:

It is necessary to state once more the characteristic principle of Christian social doctrine: the goods of this world are *originals meant for all*. The right to private property is *valid and necessary*, but it does not nullify the value of this principle. Private property, in fact, is under a 'social mortgage', which means that it has an intrinsically social function, based upon and justified precisely by the principle of the universal destination of goods. (*On Social Concern*, #42)

In relation to the current debate over "takings," Pope John Paul II's notion of a social mortgage has two implications. First, people have a right to property as a means to their living with dignity. Secondly, property is a *limited right* in relation to the needs of others and in relation to broader conditions of life necessary for the society as a whole to flourish. Thus, the right to private property is circumscribed by inherent limitations and social responsibilities. Even John Locke, who has contributed greatly to our idea of private property, held that ownership was subject to 'a proviso' that others were not in need, and that the common purpose of created things required those with surplus yield to share the fruit of their labor with the needy.³

The limitation on the right to private property as a result of social responsibilities has practical consequences. First, beyond the level of sufficiency, one may limit, by taxation for example, private accumulation of goods for the sake of ensuring that everyone in a society has access to the basic necessities for leading his or her life in dignity; second, all members of a society are obligated to restrain themselves, and government is required to regulate and to safeguard conditions needed for the protection and progress of the broader society.

(2) *Government and the Common Good.* With everyone having both rights and duties, it is the responsibility of society and the government to coordinate efforts at achieving the common good. In Catholic moral tradition, therefore, the government exercises a positive moral function. In the first instance, it is responsible for supporting, stimulating and coordinating private initiatives. But where voluntary efforts fail to safeguard and promote the common good, then the government has a right and an obligation to legislate to insure that private actors act in support of the commonweal within the context of overall respect for human rights.

John Paul II again has specifically referred to the legitimate role of the government in addressing larger common good issues. In *Centesimus Annus*, he states that:

It is the task of the Government to provide for the defense and preservation of common goods such as the natural and human environments, which

² Pope John Paul II. *On Social Concern*, #26, December, 30, 1987.

³ Melden, A.I. *Rights and Persons*, 1978.

cannot be safeguarded simply by market forces * * * the Government and all of society have the duty of *defending those collective goods*, which among others, constitute the essential goals for the legitimate pursuit of personal goals on the part of each individual.⁴

Our moral tradition recognizes that the government is a creation of the society in which it is embedded and not the other way around. While government should never as a matter of principle interfere with other elements of society when those elements of the community, e.g., the family, or markets are exercising their legitimate functions, it does have an obligation to coordinate these other elements of society to achieve the common good. It also has the right, responsibility, and duty, when other actors in society are not able by themselves or together to protect health, safety, and the environment, to do so. Certainly, the environment and ecological systems, which can cover vast geographical areas and cross government lines and national boundaries, require some degree of government regulation if the common good goal of protecting the environment for the whole public is to be achieved.

This does not mean that the government has an unlimited right to regulate even for the common good. The government can overstep its responsibilities and rights in regulating. You and I have heard of situations where government has reached too far or acted inappropriately in an abuse of its legitimate role. However, in our judgment, Congressional effort would be spent better trying to review the policy application of existing environmental laws and regulations adjusting, and improving them to meet better the goals and protection society needs rather than expanding regulatory compensation mechanisms as S. 605 does in some of its provisions. Let us deal with these excesses and abuses without undermining the legitimate role of government and society in restraining private actions which threaten the common good.

(3) *Environment as a Common Good Concern.* The environment serves as a classic case of a clear common good issue. It is a gift from God to everyone, not something owned or controlled by any one nation or privately by any individual or group. A healthy or an unhealthy environment accrues to the benefit or harm of everyone. Everyone has a right to a healthy environment. Care for land, water, and air is everyone's responsibility. No one sector of society—individuals, neighborhoods, markets, mediating communities or institutions, or the government—has the sole responsibility for caring for the environment. If the rights of individual property owners are out of balance with the rights of other owners or the rights of others in the broader society, it undermines the common good. Conversely, if environmental concerns are exaggerated to the detriment of the legitimate needs of individuals and groups, those individuals, groups, and society cannot progress. The need is to strike the requisite balance between private property interests and the legitimate role of government in regulating for the common good, especially for the environment.

From a religious and moral perspective, what seems to be lacking in the current discussion is talk about notions of stewardship which imply not only responsibility for the care of those things in our possession, but even notions of voluntary restraint and sacrifices of our uses of private property for the sake of the common good. In his most recent encyclical, *The Gospel of Life*, Pope John Paul II states that:

* * * man has a specific responsibility towards the environment in which he lives, towards the creation which God has put at the service of his personal dignity, of his life, not only for the present but also for future generations. It is the *ecological question*—ranging from the preservation of the natural habitats of the different species of animals and other forms of life to "human ecology" properly speaking which finds in the Bible clear and strong ethical direction, leading to a solution which respects the great good of life, of every life. In fact, "the dominion" granted to man by the Creator is not an absolute power, nor can one speak of a freedom to "use and misuse," or to dispose of things as one pleases. * * *

REGULATORY COMPENSATION, TAKINGS, AND S. 605

The starting point for the debate on takings is based on the Fifth Amendment to our Constitution, which states " * * * *nor shall private property be taken for public use without just compensation.*" Property has traditionally referred to land, buildings, rents, and tools—all required to provide basic necessities. If the government, in its legitimate role of protecting the common good, takes this property, then the government must compensate the owner(s) according to a fair market value.

⁴ Centesimus Annus, op. Cit., #40.

⁵ Pope John Paul II. *Gospel of Life*, #42, March 25, 1995.

This right to own and use property is enshrined in our religious tradition and in our Constitution and legal system helping to ensure one of our most fundamental rights as citizens—namely to own property free from the threat of government seizure unless justly compensated. However, what is also inherent in the Constitutional framers' words was the capacity for the government to "take" private property for the good of the public in exchange for compensation. The genius of the Constitution was the remarkable balance created between the rights of individuals and the needs of the public at large. The constitutional and the history of the court actions certainly seem to abrogate any notion of absolutism in protecting private property rights apart from common good needs.

In more recent times, the courts have begun to address and grapple with just how far the government, acting on behalf of the public, *can regulate*, as distinguished from *taking*, private property for public purposes without compensation. Given the complexity of modern society and its economy, government protection through regulation, and not just seizure, has expanded as a way to protect vital national and public interests. Some of this regulation has been criticized as unnecessary, capricious, costly, and in some instances, the courts have found uncompensated takings. At times, small landholders, small business owners, family farmers, and the average American homeowner can be bewildered by the maze of regulations and may on occasion suffer hardship in seeking redress. We do not ignore these realities.

S. 605 purports to provide guidance to the courts and to federal administrative agencies in knowing when to compensate private property owners for regulatory actions. However, in our judgment, the legislation goes too far by elevating private interests over the government's ability to protect the common good in areas like the environment. Expanding the triggers for compensation based on affected portions of property could significantly alter the proper balance among various neighboring groups of private property owners and the public's interest in environmental and public health and safety. By creating lower thresholds for initiating takings actions by private concerns, by inhibiting the government's legitimate ability to enforce regulations already on the books by requiring excessive impact analyses, and by increasing taxpayer costs for new and expanded takings compensations, the legislation goes much further than necessary to address what some perceive as overregulation under current law.

Given our teaching on private property and the common good, the US Catholic Conference is very concerned about legislative proposals to expand vastly the concept of property rights in which both the social purpose of private ownership and the social responsibilities (and moral limits) of property owners are diminished. It could give acquisitive individualism a trump over the responsibilities and obligation of individuals and groups, and especially of government, to the common good. We prefer a more modest approach in assessing regulation for its human, economic, social, and environmental consequences.

POSSIBLE SOLUTIONS

If the Congress wishes to provide some further relief to private property owners facing regulatory difficulties, there are alternative approaches to those offered in S. 605 that should be further discussed and considered. Given the principles which shape our moral tradition regarding private property and the common good, these alternative approaches are also shaped by certain guidelines.

First, *laws should fully protect society while avoiding the imposition of unwarranted burdens*. To the extent that there are objections to certain regulations, we suggest as a first step that the Congress debate and address directly the potential changes needed in current laws and regulations rather than adopt more rigid and expansive property notions and automatic compensation procedures as contained in the proposed legislation. This debate could be supplemented by improving community involvement in common sense local solutions, developing community feedback mechanisms, and improved training of regulatory officials.

Second, *a more flexible approach in implementing regulatory measures as they affect small property owners should be considered*. At times, these owners may encounter particular difficulty in meeting government requirements. Special regulatory accommodation could be made for families as homeowners, small businesses, and small family farmers, especially those of modest means. We must remember that large numbers of Americans own little property and certainly not property of great economic value. It is important to recognize, however, that regulation is often needed to protect the homes and jobs of average Americans. We need to distinguish carefully between governmental action and regulations that can mean the difference between economic survival and demise of families and small businesses, and larger enterprises where these realities simply effect their profit margins.

Third, *there is a need to develop ways to expedite judicial proceedings in takings cases to make them more efficient and less costly.* Consideration should be given to alternative dispute mechanisms, including arbitration, the use of Ombudsmen, and speedier permit processing, thereby reducing the reliance on litigation in takings disputes. In situations when a takings claim is made, the goal should be to speed up the process of resolution and compensation when warranted. Our society in general relies too often on litigation to resolve problems. Litigation is an expensive process, particularly for small property owners. The goal is to make the system fairer and limit the cost of the claims procedures for all parties involved. In this regard, some elements of Title III, Alternative Dispute Resolution, of S. 605 deserve serious consideration.

CONCLUSION

In closing, we want to stress the need for taking the time to truly promote a larger civic dialogue about the kind of environmental and other goals and protections this nation wants to support in pursuit of the common good. Without doing this, we risk the danger of a further polarization of society between narrower private interests and larger public concerns. Avoiding a new public debate and consensus over these matters and adopting too rapidly an expansion of private property rights could undermine both respect for private property and the common good.

Our hope is that the takings issue can serve as a way to begin a broader debate to look more closely, as a society, at how we can continue to promote both private property and the environment as matters of the common good and not create a house divided against itself.

As advocates of both private property and the common good, we urge you to think deeply, to consult broadly and to weigh carefully before you act decisively to reorder the relationship between private interests and public goals. We believe there are more modest and common sense approaches which will disappoint the extremes on these issues, but can serve better the nation and promote the common good.

Senator LEAHY. I think this morning gives us an opportunity to debate the fundamental issues regarding the relationship of citizens to their own communities. I was not old enough to vote for John Kennedy when he ran for president, but I do well remember him saying, "Ask not what your country can do for you, ask what you can do for your country."

But, later, after President Kennedy's term, I did become old enough to vote, and I do remember in the 1960's, another very different motto, which was "do your own thing." This kind of a do-your-own-thing approach led in many ways, I believe, and I was a prosecutor at that time, to the drug culture. "It's my brain," they claimed. "I can do anything I want with it."

I think these mottos exemplify a basic issue in our political lives, the balance between individual rights and community responsibility and the community responsibility that President Kennedy spoke of but sometimes the overextension of individual rights that those in the drug culture speak of.

What is the balance between our rights as individuals or our responsibilities to our neighbors? Do we have a right to take any drugs we want? Do we have a right to use our property in a way that hurts our neighbors? There are some who claim any time the community asks a person to limit the use of his or her property it is a taking under the fifth amendment.

I have no sense of defensiveness in this. The Vermont State constitution has the strongest private property protection provision of any State constitution in the country.

I remember in 1981, when Senator Paul Laxalt and I joined to pass a regulatory reform bill. The Laxalt-Leahy bill addressed this issue very well, and it passed the Senate almost unanimously.

In the 1990 Farm bill, I wrote the wetlands provision for farm programs so that no longer would a farmer lose all his benefits if he or she made a good-faith mistake. It gave farmers the flexibility to change farming practices. It was the kind of user-friendly item that Senator Chafee just referred to. In fact, I wish the last administration had told farmers more about the flexibility that the law contains.

But, as a member of the Judiciary Committee, let's talk about the Anglo-Saxon provisions here. Also, I want to speak as a citizen of one of the most rural States in the Nation and a member of the Senate Agriculture Committee.

As Americans, we share certain basic community values. We have this basic one that, "Your freedom ends where my nose begins." I think that common value is now being challenged. Takings bills assume that property owners have a right to use their property in a way that harms their neighbors. That is not the American way. Nobody has ever had an unfettered right to use their property in a way that hurts their neighbors.

Before the American Revolution, our values were reflected in the common law. Under the common law, nuisance was a legal expression of the maxim, "Your freedom ends where my nose begins."

As one commentator says, "The beauty of a simple nuisance case is that it reduces that case to terms a lay person can understand: 'You dumped it, it hurt me or my property, and you should pay.'"

Indeed, in the landmark *Lucas* case, Chief Justice Rehnquist noted that, if the South Carolina law had its basis in historic nuisance law, it would have violated the fifth amendment.

In a sense, most modern environmental, labor and safety laws grow out of the same moral assumptions. The Clean Air law says that a polluter cannot use his property to cause a child to get asthma.

The occupational health statutes say that an employer does not have a right to use his property in a way that injures or kills his employees.

The labor laws say that an employer does not have the right to use his property to exploit children. Incidentally, if you go back in history, the opponents of child labor laws claim they interfered with the private property of the mill owners. They said that they should be allowed to hire 8-, 9- and 10-year-olds in terrible conditions because otherwise you interfere with their property rights.

Wetland laws say you cannot use your land to flood my land or lower the water table and dry out your neighbors.

A lot of people of the so-called property rights bills, the people in support of, disagree with this premise of our legal heritage. They claim a citizen has to be paid not to use his property in a way that might injure his neighbor.

I am sure that Midwest utilities would not resolve a clean air issue in a nuisance action brought on behalf of an asthmatic child in a Caledonia County Vermont courtroom.

That brings me to my second point. Rural Americans have always understood there has to be a balance between individual rights and community responsibility.

In fact, on board the Mayflower, the Pilgrims' leaders were frightened by the boasts of a few unruly passengers, and they came

up with the Mayflower Compact to protect the common good against an unruly minority.

Our Constitution was written to both protect the general welfare, but also to secure the blessings of liberties.

When the wagon trains started West, there was never any doubt, as Daniel Boorstin said, "that any hint or a doubt that final control on all matters rested with the majority."

When you look, for example, at our community institutions that limit property rights for the general good, take the 19th Century, milk was not a major commercial product because it carried diseases such as tuberculosis. Legal standards were imposed which required farmers to spend large sums upgrading their facilities to ensure milk safety. Thus, farmers' compromised their right to produce milk as they saw fit, but they created a market that benefited most dairy farmers.

Another example is wetlands. Farmers have joined together to form drainage districts to carry away unwanted water. To jointly drain these lands for their mutual benefit, each farmer gave up some control over his land. Every farmer was, and still is, required to pay an assessment for maintenance of the drainage system. Drainage districts build ditches across farmers' fields, even against their will, to benefit all farmers.

There are a whole lot of other examples of how rural Americans joined together. In the West, weeds that damage grazing lands, called noxious weeds, can reduce the value of ranchers' lands. They have to be controlled in all lands. In States like Nebraska, if the county weed supervisor identifies a noxious weed infestation on private land, the supervisor may order the landowner to treat the infested land. If he refuses to destroy the weeds, then the county destroys the weeds on private property, and the cost is added back to the landowner, and he has to pay an extra 10 percent charge for the treatment costs.

In South Carolina, as the distinguished Chairman is well aware as we talk about takings abandoned fruit trees harbor pests. South Carolina has given the State Crop Pest Commission power to destroy abandoned orchards if the trees are a menace to the fruit-growing industry. They go even further in South Carolina. The State has the authority to put a lean on the property until the landowner pays to destroy the trees, his own trees on his own property. Now that is something South Carolina—a very conservative State, I think the Chairman would agree—has done to protect the common good.

There are 25 states that have similar weed or pest control statutes. Delaware does, Utah does, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, South Carolina, Tennessee, Washington, Wisconsin, Wyoming. A lot of States—nine other states—have similar weed or pest control statutes, but require a court order.

Every State has a comprehensive statute to control animal diseases. Some give the power to prevent the movement of diseased cattle. We know cattle prices go up or down. Are we going to say that the State tells somebody, "You have got the possibility of brucellosis in your herd. You can't move it." And they say, "Wait a

minute. You have got to pay me for the cattle prices that went down during that month they were quarantined." We are not going to do that. We can't control our livestock otherwise.

These laws restrict private property rights, but the benefiting of protecting the community from negligent landowners outweighs the costs incurred by the individual.

Some feel that property rights of the individual should override the well-being of the community. That is not the American tradition. It is not rural American tradition. Both our traditional American values and the value of our rural land are at stake in this debate. Each landowner has rights, but also has responsibility to their neighbors.

Senator LEAHY. Mr. Chairman, as you know, the Ruby Ridge hearings are starting up, and I am a member of that panel, and I would ask if I might be excused to go to that.

Senator THURMOND. Thank you very much, Senator, for your appearance.

Senator LEAHY. Thank you.

Senator THURMOND. If any of the Senators on the committee have any questions, obviously, you may indicate to me, and we will give you the opportunity. Otherwise we will just get statements from the Senators who are testifying and then move on to the witnesses.

We will now move to our second panel, Senator Richard C. Shelby. We are very pleased to have you with us.

STATEMENT OF HON. RICHARD C. SHELBY, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SHELBY. Thank you, Mr. Chairman. I am pleased to be before the Judiciary Committee this morning. After this, I am scheduled to testify over on the House side on another matter. I would like to respond to some questions. If you have any, any of you, including Senator Biden or Senator Simon or Senator DeWine, the Chairman, himself, we will do our best to answer them.

Mr. Chairman, I believe that this is an opportunity to speak about title V of the Omnibus Property Rights Act. That is why I am here. While there have been some criticisms of this section, just a few minutes ago, I feel confident the criticisms are unfounded and based on a fundamental lack of understanding of property rights.

Some have suggested title V amends the Endangered Species Act and the Clean Water Act and, therefore, should be addressed in the Environment and Public Works Committee and not this Committee. I believe this is not correct. Title V does not attempt to change the laudable goals of those Acts. Instead, title V is about property rights and the Government regulations that infringe on those rights. We do not, Mr. Chairman, attempt to change any goals of these statutes, but merely seek, yes, merely seek, to change the administration of the laws with respect to property rights.

Although the goals of the Endangered Species Act are commendable, the means by which the act chooses to achieve the goals, I believe, are simply misguided, ineffective and doomed for failure.

Instead of treating endangered species as the assets that they truly are, the Endangered Species Act has caused endangered spe-

cies to be a tremendous liability borne by very few specific property owners.

To illustrate, assume the Federal Government passed a regulation that said, "Any house that is found with a Vincent van Gogh painting must be vacated and no individual may live in that house because van Gogh is dead, the paintings are in short support and they are highly valued." We all know that.

Now suppose that a family living in a home that has been in the family for generations finds a van Gogh painting in the attic or in the wall. The incentives the family faces are simple: report the finding to the Government, who will throw them out of their home, without compensation, or destroy the picture in order to hide it from the Government so they can continue to live in their home.

This is what the Endangered Species Act does. Landowners are very familiar with the phrase, "shoot, shovel and shut-up." In essence, if a property-owner finds an endangered species on his or her land, he has, under the act, the incentive to shoot it, shovel it away and not tell anyone he found it. This adversarial relationship exists because the ESA currently does nothing to encourage the conservation of endangered species.

In the United States, 895 species are currently listed as endangered or threatened. After more than 20 years, only two species have been delisted because of the success of the act. Of the 23 species that have been delisted, 13 were from data errors that is, they should not have been listed in the first place, and seven have become extinct. That is a very poor record, I believe. These numbers validate the assertion that the Endangered Species Act has not achieved the purposes it was set out to achieve.

Another criticism of title V is that it costs too much money. That may be convenient, but the more important question is, "How much is the Endangered Species costing us in its present form?" This is not an easy question to answer. First of all, the Fish and Wildlife Service is not forthcoming with estimates. Although they are required by law to report the Federal expenditures used in regards to the ESA, the data remains largely unpublished and seems to be attained only through the Freedom of Information Act.

However, based on information from the Inspector General, estimates suggest that Federal expenditures on the Endangered Species Act run between \$9 and \$13 billion a year. This figure does not include State and local expenditures, the reduction in tax revenues due to the reduced business activity, land devaluation and lost jobs. Some critics claim that the Endangered Species Act and Wetlands regulation do not physically take land away from individuals and, thus, should not be considered a taking. That claim is missing the fundamental principle of property rights.

Property rights are not simply rights of ownership, but a bundle of rights that include the right to utilize property as one chooses. As such, a regulatory taking is a de facto taking and, therefore, a violation, I would submit, of the fifth amendment.

Title V simply requires notice and consent from property owners before Federal agencies and their agents can enter a private property owner's land for purposes of the Endangered Species Act or Wetlands laws.

In addition, this title ensures that property owners rights are considered and respected when agency decisions or actions are taken pursuant to these two laws by providing an administrative appeals process that we don't have today. The process calls for the owner to be given access to the information collected, a description of the way the information was collected, yes, and an opportunity to discuss the accuracy of the information.

Lastly, it requires the agency itself to determine whether a taking has occurred and, if so, to compensate the private property owner for the loss in fair market value of the property.

A property owner who is deprived of at least a third or more of the fair market value would be entitled to receive compensation under our bill. The agency would be required to pay the fair market value of the property if purchased or the difference between the fair market value of the property without the restrictions and the fair market value of the property with restrictions.

In closing, Mr. Chairman, I would like to quote two insightful, but diametrically opposed, philosophers. The first is from Friedrich von Hayek, most commonly associated with Austrian economics. He once said, "The system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not." Mr. Hayek understood that the most basic tenet of a free society starts with private property rights.

Even Karl Marx realized this. The Communist Manifesto written in 1848 states, " * * * the theory of Communists may be summed up in the single sentence; Abolition of private property."

Make no mistake, Mr. Chairman, regulatory takings effectively abolish private property rights. Karl Marx knew it, Friedrich von Hayek knew it, and the American people know it.

Mr. Chairman, I also have a statement from Senator Nickles, who is a co-sponsor of this section of the bill with me, and he asked me to ask that it be placed in the record after my testimony.

Senator THURMOND. Without objection, that will be done.

[The prepared statement of Senator Nickles follows:]

PREPARED STATEMENT OF SENATOR DON NICKLES

Mr. Chairman, of all the freedoms we enjoy in this country, the ability to own, care for, and develop private property is perhaps the most crucial to our free enterprise economy. In fact, our economy would cease to function without the incentives provided by private property. So sacred and important are these rights, that our forefathers chose to specifically protect them in the Fifth Amendment to the U.S. Constitution, which says in part, "nor shall private property be taken for public use, without just compensation.

Unfortunately, some federal environmental, safety, and health laws are encouraging government violation of private property rights, and it is a problem which is increasing in severity and frequency. We would all like to believe the Constitution will protect our property rights if they are threatened, but today that is simply not true. The only way for a person to protect their private property rights is in the courts, and far too few people have the time or money to take such action. Thus many citizens lose their Fifth Amendment rights simply because no procedures have been established to prevent government takings.

Many people in the federal bureaucracy believe that public protection of health, safety, and the environment is not compatible with protection of private property rights. I disagree. In fact, the terrible environmental conditions exposed in Eastern Europe when the Cold War ended lead me to believe that property ownership enhances environmental protection. As the residents of East Berlin and Prague know

all too well, private owners are more effective caretakers of the environment than communist governments.

Yet the question remains, how do we prevent overzealous bureaucrats from using their authority in ways which threaten property rights? The bill that is before us today, The Omnibus Property Rights Act of 1995, addresses this issue in several ways. First, it requires the government to assess whether existing or proposed regulations result in an unconstitutional taking of property prior to acting. Second, it requires compensation if any property that is taken for public use without the consent of the owner is devalued by 33 percent or more. Third, it creates a streamlined cause of action by which property owners can obtain compensation for the taking of their property.

The Omnibus Property Rights Bill of 1995 also includes provisions of the Private Property Owners Bill of Rights, S. 239, that Senator Shelby and I introduced in January of 1994. S. 239 targets two of the worst property rights offenders, the Endangered Species Act and the wetlands permitting program established by Section 404 of the Clean Water Act.

The Private Property Owners Bill of Rights, requires Federal agents who enter private property to gather information under either the Endangered Species Act or the wetlands permitting program to first obtain the written consent of the landowner. While it is difficult to believe that such a basic right should need to be spelled out in law, overzealous bureaucrats and environmental radicals too often mistake private resources as their own. Property owners are also guaranteed the right of access to that information, the right to dispute its accuracy, and the right of an administrative appeal from decisions made under those laws.

The enforcement of the Endangered Species Act and the wetlands provisions in the Clean Water Act is part of a growing and disturbing trend of "big-brother" intrusion into the lives and businesses of private citizens. From the northern spotted owl to the American burying beetle, the Endangered Species Act is being manipulated by extremists to stop development on public and private lands without regard to economic impact or citizen's rights.

Although the spotted owl has received most of the attention, no less threatening is the disruption caused by lesser known species. In Oklahoma, the prairie mole cricket delayed state highway projects for months before scientists discovered that the cricket's population was not threatened. Similarly, the endangered American burying beetle forced redesign and rerouting of a major gas pipeline in southeastern Oklahoma. Although these examples do not approach the economic significance of the spotted owl, they clearly illustrate the flawed construction of the Endangered Species Act.

No less absurd are the impacts of the wetlands provisions in the Clean Water Act when inappropriately applied by government bureaucrats. The Creek Turnpike in Tulsa was endlessly delayed because the U.S. Corps of Engineers "discovered" about four and a half acres of "wetlands" in the proposed construction zone. In spite of the fact that the Turnpike Authority offered to purchase and give to the government more wetlands than the road would fill, the Corps objected. It was estimated that if all the so-called wetlands had to be bridged it would raise the turnpike's cost by \$14 million. In addition, each day of delay cost about \$20,000. Although this issue was finally resolved, the process added unnecessary delay and costs to a much needed project.

Both the Private Property Owners Bill of Rights and the Omnibus Property Rights Act of 1995 guarantee compensation for a landowner whose property is devalued by a federal action under the Endangered Species Act or wetlands permitting program. An administrative process is established to give property owners a simple and inexpensive way to seek resolution of their takings claims. If we are to truly live up to the requirements of our Constitution we must make this commitment. I believe this provision will work both to protect landowners from uncompensated takings and to discourage government actions which would cause such takings.

Mr. Chairman, the time has come for farmers, ranchers, and other landowners to take a stand against violations of their private property rights by the federal bureaucracy. The Omnibus Property Rights Act of 1995 will help landowners take that stand.

Senator SHELBY. Mr. Chairman, I would be glad to respond to any questions, and I am sure that the Senator from Delaware has probably got a couple of hundred, but I am due over on the House side in a few minutes to testify on another matter. If you will excuse me, I will be glad to answer for the record.

Senator BIDEN. Mr. Chairman, I wouldn't want to deny the House the opportunity to hear the Senator, and I just want to know if you find that guy who found the van Gogh painting, tell him leave the house and keep the painting. He can make a lot more money. [Laughter.]

Senator SHELBY. If I find the man and the house, we will move in together. [Laughter.]

Senator THURMOND. Thank you for your testimony, Senator. We are glad to have you with us.

Senator THURMOND. We will now turn to panel III. We will ask all of these witnesses to come forward. Mr. Keith W. Eckel, President of Pennsylvania Farm Bureau, if you will take the seat on the end; Ms. Merrily Pierce, Second Vice President of Fairfax County Federation of Citizens Association; Mr. Joseph L. Sax, Counselor to the Secretary of the Interior; Mr. Jonathan H. Adler, Director of Environmental Studies, Competitive Enterprise Institute; Professor Richard G. Wilkins of BYU Law School.

We are very pleased to have all of you people with us.

We are going to allow you to take 5 minutes to make a statement, and then we will put the rest of your statement in the record, so as to give time to the members of the Committee to ask questions.

Mr. Eckel, you may proceed.

PANEL CONSISTING OF KEITH W. ECKEL, PRESIDENT, PENNSYLVANIA FARM BUREAU; MERRILY PIERCE, SECOND VICE PRESIDENT, FAIRFAX COUNTY FEDERATION OF CITIZENS ASSOCIATION, McLEAN, VA; JOSEPH L. SAX, COUNSELOR TO THE SECRETARY OF THE INTERIOR, WASHINGTON, DC; JONATHAN H. ADLER, DIRECTOR OF ENVIRONMENTAL STUDIES, COMPETITIVE ENTERPRISE INSTITUTE, WASHINGTON, DC; AND RICHARD G. WILKINS, BRIGHAM YOUNG UNIVERSITY LAW SCHOOL, PROVO, UT

STATEMENT OF KEITH W. ECKEL

Mr. ECKEL. Mr. Chairman, my name is Keith Eckel, and I am from Clarks Summit, PA. I am a farmer in Clarks Summit, and I represent the American Farm Bureau of Federation here today. I serve on their board of directors and as a member of their executive committee.

I am involved in a vegetable and grain operation in Clarks Summit, and I would ask the Chairman that our written statement be made part of the record.

Senator THURMOND. Without objection, that will be done, and that will be the case with all of you. Your full statements will go on the record, so it is a brief presentation to 5 minutes.

Mr. ECKEL. Indeed, it is an honor to testify before the Judiciary Committee this morning. I come to you with strong concerns on behalf of farmers and ranchers as far as the infringement on private property rights occurring in America today.

I assure you, without question, that one of the main concerns of my members and my fellow farmers is the infringement on private property rights by government regulatory action.

I come here today, Mr. Chairman, to congratulate you on your support of this legislation, which I believe is critically important to the agricultural community. I come here also puzzled, puzzled that there is a belief that private property rights is an antithesis to environmental protection and quality. I firmly believe that it is not an antithesis, but indeed its most important support.

I invite you to come to Pennsylvania to visit my farm, to visit the farms of my neighbors, view the contour strips, view the diversion terraces that have been installed and recognize that farmers, who are investing in their future, believing that that investment is safe and protected for their children without fear of that land or its use being taken away from them, has caused them to make those investments and then tell me that respect for private property rights is an antithesis to environmental quality.

In fact, Mr. Chairman and members of the Committee, I believe that just the reverse is true and that today we should use today as an opportunity to recognize that we can work with an observation of private property rights in a direction toward increased environmental quality in the confines of the legislation that is proposed.

Simply this legislation does three things, at least as I understand it. No. 1, it says to government, simply look before you leap. It says to the regulators, it says to the legislators, before you pass legislation, before it is implemented and the regulations are developed, analyze what impact that is going to have on private property rights and recognize that there, in fact, is a cost involved.

Two, it indicates that there needs to be an expeditious appeal system. I have a friend. His name is Bill Stamp. He is the president of the Rhode Island Farm Bureau. He, for 10 years, has struggled with wetland regulations. He is an honest, hard-working farmer. But as a result of those regulations and no attention being paid to his private property rights and his pursuit of his constitutional rights, on January 1, his farm will be foreclosed on, not because he is not a successful farmer, but because he cannot negotiate the costs of complying with the regulations and pursuing his constitutional rights. That, in fact, is what the second provision of this legislation would do.

And, thirdly, it does call for compensation. And, after all, gentlemen, is it not true that if it is in the public interest, it absolutely should be at the public cost, and if it is too expensive for the public at large, how is the individual property owner expected to pay that bill?

I believe very strongly that private property rights are a basic tenet of our economic and political freedom, and there are two ingredients that I think are critical in protecting our environmental quality; one, is the care of the landowner, and who has more concern for the land than that person from whom his living will come and his children's living will come?

And the second concern is that private property, in fact, is the basis for our economic development. Gentlemen, if central government regulatory control without respect for private property rights was an answer to environmental quality, then Eastern Europe would be a shining example of environmental quality.

In contrast, visit Pennsylvania. See our farms. See what private property owners have done to invest in their land and improve that land for their children.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Eckel follows:]

PREPARED STATEMENT OF KEITH ECKEL ON BEHALF OF THE AMERICAN FARM BUREAU

In the current regulatory climate at all government levels, the right to own and use private property has become an afterthought. The so-called "property rights movement" of the 1990s is nothing more than a reaffirmation of where we started 200 years ago. Look-before-you-leap and takings compensation legislation are simply attempts to move the rights of property owners back to where they once were and where the Constitution intended.

First of all, Mr. Chairman, farmers and ranchers care deeply about their land and the environment. It is a tragedy that the current regulatory process in this nation has come to the point that legislative action is necessary. Farmers and ranchers can and will provide the widest possible spectrum of environmental protection if their right to property is secure and they are freed from the disincentives under which they currently operate.

LEGISLATIVE REFORM

Legislation should require the federal government to do three simple things. First, it should require consideration of the impact on private property when government actions are contemplated. That is the concept of look-before-you-leap. We are mystified at the negative reactions that so many have to such a simple idea. This would introduce some measure of fiscal responsibility and estimate some of the costs of actually accomplishing a policy goal.

Second, the legislation should require that when actions are taken and owners of private property have lost constitutionally protected rights, a process be in place to provide for administrative appeal of decisions or go directly to court for relief. Under the current system, few property owners have the money or time to struggle with the bureaucracy and the courts. There has to be a way to sort out the facts and arrive at decisions in a timely and cost-effective manner.

Third, when property has been taken in violation of the standards set by the Constitution, there must be compensation. The Fifth Amendment recognizes that there will be times when the rights of property owners will have to give way to the wider needs of government policy. It provides just compensation as a solution, not a perfect one, but one that is acceptable.

Farming and ranching are land-intensive operations for the production of crops and livestock. Land is by far the single most valuable asset in most farm or ranch operations. Private property ownership is often referred to as a "bundle of rights," that includes the right to own property, the right to use property and the right to dispose of property. The sum total of this "bundle of rights" comprises the value of the property. Regulations that restrict property uses often restrict the ability of that property to be transferred, owned and used in the ways desired by the property owners.

Farm and ranch lands are particularly vulnerable to land use restrictions because there are fewer alternatives for the use of such lands than there might be for other types of commercial property. In most cases, farming and ranching is the only viable economic use of the property, and its value derives from use as a farm or a ranch. This is particularly true in those many locations that have agricultural district programs that tax such lands on their use as agricultural lands with the understanding that they will remain agricultural lands.

COMPENSATION

The Framers of the Constitution recognized the tension that sometimes exists between the rights of private property owners and the desires of government to regulate for the public interest. They crafted a clear solution that accommodates the interests of both sides through the Fifth Amendment. The Fifth Amendment allows the federal government to appropriate private property for public use but only on the condition that the private property owner be compensated for the loss of that property. Significantly, the Fifth Amendment does not limit the right to compensation to cases where all of the value of property is taken for the public use, or even

when 50 percent of the value is lost. By its terms, it applies to any appropriation of private property for public use.

We believe that the Fifth Amendment is absolute in its terms and therefore oppose any threshold level before compensation is payable. We appreciate efforts to provide some degree of certainty in determining when a taking has occurred by establishing a threshold amount of property value that must be lost before a compensable taking under those bills occurs. Some degree of certainty in this regard is necessary if an administrative claim procedure described above is to be viable. Of course, a statutory rule does not displace the constitutional guarantee of the Fifth Amendment.

There is no practical difference between a government agency taking a strip of land because it wants to build a highway and a government regulation prohibiting the use of property because of the presence of an endangered species or a wetland. In both cases, the landowner has lost the use of all or a portion of his or her property. In both cases, the loss of use diminishes the value of that private property in the name of the public interest.

Likewise, the federal government compensates private property owners when it buys private property to create a federal wildlife refuge. Again, there is no practical difference between formal creation of a wildlife refuge and *de facto* creation of a series of refuges resulting from prohibitions of use of private lands in the name of endangered species or wetlands protection.

Whether a land use restriction is classified as a physical taking or a regulatory taking, a permanent taking or a temporary taking, there is one common element—landowners are deprived of the use of all or part of their property. From the perspective of farmers and ranchers, it makes no difference to their operations if land is appropriated for use as a highway or if they are prohibited from using their property because of the presence of a listed species or a wetland. They have lost economic use of that property in either event.

In addressing the issue of why compensation is required for takings caused by environmental regulations, it is also important to reiterate the fundamental basis underlying the Fifth Amendment. That principle, as often stated by the U.S. Supreme Court, is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." If a government action or regulation benefits the general public, then the Fifth Amendment requires that any costs of that action or regulation be borne by the public as a whole, and not by a few.

A substantial part of federal environmental legislation seeks to promote a broad, general "public interest." The Endangered Species Act, for example, declares that protection of species is in the national interest. Likewise, protection and preservation of wetlands is declared to be in the national interest. Indeed, for both of these statutes, a national public interest must be found in order to justify federal legislation.

These "national in scope" environmental regulations are primarily imposed on farmers and ranchers, who make up less than two percent of the total population. Especially in the case of endangered species and wetlands regulations, these programs naturally target open, largely undeveloped land because that is where the species and the wetlands are found. Most of the privately owned land fitting that description belongs to farmers and ranchers. Over 75 percent of our nation's wetlands are located on private property. Reports indicate that nationwide 78 percent of listed species are on private lands, with 34 percent exclusively on private land. Most of this is farm and ranch land. Farmers take pride in producing food while seeing wildlife on their property.

With the protection of wetlands and endangered species being in the national public interest, the costs of that protection should be borne by the public as a whole. The means of distributing those costs from society as a whole to those affected few is through just compensation.

We recognize that the right to use one's private property is not absolute. Property owners, for example, cannot use their property in an unlawful manner. Further, property owners may be restricted from using their property in such a way that causes harm and that injures the property of another. Regulations designed to prohibit unlawful use of property, use of property that is a common law nuisance and/or that injures the use or enjoyment of property of another would, in our view, not require compensation. These types of regulations are part of a category of regulations traditionally described as "police powers"—those designed to protect the "health, safety or morals" of the public, or to prevent public nuisances.

Most environmental statutes and regulations that are most burdensome to farmers and ranchers fall outside of this category. Thus, the compensation requirements cannot be characterized as "pay-to-pollute" provisions, because none of the activities

covered either cause pollution or involve the exercise of traditional police powers. For example, section 204(d)(1) of S. 605 plainly states that no compensation shall be required if the use of the property constitutes a nuisance. This is the same rule adopted by the U.S. Supreme Court in *Lucas vs. South Carolina Coastal Council* in 1992. Acts of pollution are a nuisance and, thus, polluters will not benefit under this bill.

Many of these laws and regulations simply fall outside the scope of traditional police power authority, and are based on entirely different grounds. The Endangered Species Act, for example, was enacted under the Commerce Clause. While the Act finds a "public interest" in preserving species, the Act does not say that the "health, safety and morals" of the country require it. The Endangered Species Act therefore falls outside the traditional "police power" matrix of federal regulation. ESA regulations that restrict or deny use of private property therefore cannot claim possible exemption from the Fifth Amendment's just compensation requirements.

Our organization has long supported fiscal responsibility by the federal government. It is not our intention to see private property legislation "bust the federal budget." Undoubtedly, you have heard this claim. But it only points out that if the cost is that high, then it is now being borne by property owners. If the federal government wants to use the property for the good of all, it is only fair that all share in its cost.

ADMINISTRATIVE PROCEDURES

Farm Bureau is particularly interested in and supportive of an administrative procedure for private property owners to obtain compensation for lost property rights.

Some Farm Bureau members know first hand the exorbitant costs associated with pursuing litigation to protect their legitimate private property rights. These people often have to pursue claims through an administrative process before going to federal or state court, and then maybe to an appeals court before their claims are finally resolved. Pursuing these claims take a great deal of time, but also a great deal of money spent for attorney fees, court costs, discovery and other costs as they go through the various steps. Most Farm Bureau members cannot afford to pursue such claims at all and thus are victims of the process.

Providing private property rights protection under the Constitution means nothing if there is no way to enforce them. Private landowners should not be precluded by the high costs of our legal system from protecting their property rights. While our government should be sensitive to the property rights of private landowners and structure regulations in such a way that does not impact those rights, this is unfortunately not the case in actual practice. An affordable administrative procedure that allows private property owners to protect their legal rights is an absolute necessity, and we are pleased that a simplified, less formal and less expensive and time-consuming procedure is provided in these bills.

REFOCUS ENVIRONMENTAL PROTECTION

By placing the responsibility for costs of environmental protection on the public where it belongs, agencies would have to refocus their regulatory efforts toward legitimate governmental interests. Where public policy implementation is achieved at little or no cost, as in the uncompensated restrictions on private property rights, there is virtually no limit to what agencies believe they can do. Where the perceived benefits of promoting governmental policies are separated from the costs of implementing those policies, there is no governmental accountability or public responsibility. In fact, they feel obligated to regulate even more, while lines of legitimate governmental interests in carrying out congressional mandates become blurred. The result is overregulation.

Associating costs to governmental regulation of endangered species and wetlands regulations will refocus the agencies on their proper and legitimate regulatory responsibilities. In the case of wetlands, agencies will be forced to focus on protection of those wetlands that are important for public health and safety purposes by making assessments of the functions and values of wetlands and determining which are most worthy of protection. With regard to endangered species, agencies will have to concentrate on how best to protect species instead of spending their appropriated funds on trying to convince the public to support such things as wolf and grizzly bear introduction.

There is no question that positive incentives would result in better protection and would better accomplish the goals of the programs better than negative regulation. This is especially true for the Endangered Species Act, where over 20 years of negative regulatory direction has produced only a handful of species that have achieved

the recovery goals of the Act. Farm Bureau actively supports the idea of incentive programs for both wetlands and for endangered species protection as a means of achieving the goals of both regulatory programs without infringing on private property rights.

"GIVINGS"

We also comment on the issue of government action as a "giving". It is unfortunate that "takings" and "givings" are discussed as part of the same issue. The government "givings" concept is not rooted in the Constitution.

Bruce Yandle, Alumni Professor of Economics and Legal Studies at Clemson University, puts it this way: "In contrast, if a highway is built near the owner's land, and her land increases in value, the owner has received no property *rights* [emphasis added]. She has no legal right to stop a later decision to relocate the highway. She has simply won a lottery. If a regulatory decision is made to close the highway due to congestion or flooding, and the landowner's property values fall by 50 percent, that is no taking and no compensation is due. Payment is required when rights are transferred, not when luck of the draw affects values."

The "givings" and "takings" issues have been raised with respect to price and income support programs for farmers and ranchers. If payments to agricultural producers were reduced, that would have an impact on land values because some portion of the yearly payments has been capitalized into the value of land. That would certainly cause hardship for those producers, but it is not a takings as defined by the Constitution. There is no constitutional right to receive farm program payments.

The issue is not about value of property. It is about the right to own and use that property, and regulations that restrict that ownership and use.

Farm Bureau believes that there are many cases where property owners gain value in their land through the actions of the federal government, but they can also gain value from several other sources. But nowhere are those gains deemed to constitute "property rights." That is the crucial issue in this debate.

CONCLUSION

Government at all levels has been disregarding private property rights for so long that it will take considerable change to fully protect private property rights as intended by the Constitution.

We support S. 605, the Omnibus Property Rights Act of 1995, as an important step in the rebalancing of power between property owners and government.

Senator THURMOND. Thank you very much. Pleased to have you here.

Our next witness is Ms. Merrily Pierce.

STATEMENT OF MERRILY PIERCE

Ms. PIERCE. Good morning, Mr. Chairman, and members of the Committee. My name is Merrily Pierce, and I am a homeowner. I am also vice president of the Fairfax County Federation of Citizens Associations, which was founded 55 years ago. The Federation is the largest civic association in the county and the umbrella organization for over 150 homeowner associations representing about 200,000 homeowners.

We rarely, if ever, have an opportunity or reason to address a Senate Committee, and we are honored to be here this morning. I am here because of our concern over S. 605. The fifth amendment of the U.S. Constitution states that there shall be no takings of private property without just compensation. This provision is self-executing. No laws need to be passed to define it nor to implement it. What actually is a taking of private property is defined by the courts on a case-by-case basis looking at the specific facts of the case, including the effects of the proposed action on neighbors, the community and broad public interest.

This procedure has defined takings of private property since the Constitution was adopted. The Federation supports the Constitution and, therefore, strongly opposes S. 605.

In weighing this so-called property rights legislation, we think that Congress should recognize that the largest number of property owners in this country are homeowners. This legislation would most definitely hurt, not help, this constituency.

First of all, we have to ask why our tax dollars should be used to compensate more often than now required and what limitations will the Congress put on increasing the mandated frequency of payment?

In simple terms, S. 605 would take dollars out of the pockets of our members and of homeowners across the country.

Second, the legislation represents an ominous threat to the security of our private property rights. Our homes are the most important investment most of us will make in our lifetimes. We want to protect the value of that investment. Therefore, we depend on basic health, safety, zoning and environmental regulations to help us maintain our quality of life and those property values. Takings legislation would undermine the laws and regulations which protect our communities and our homes.

I have included several examples of situations we have faced in our county in my written testimony. I have time to cite only one recent disaster to homeowners, which could have been prevented had the necessary regulations been in place.

In the middle of our county, there is a large, well-established community of 1,500 homes. The community of Mantua has its own elementary school, tennis courts, a swim club, a stream valley park with trails, meandering streams and established hard-wood trees throughout. A strong citizens association organizes neighbors for parades, holidays and to welcome newcomers. This is a community with a rare sense of place and used to be a sought-after location for home buyers.

Five years ago a resident noticed oil flowing on the surface of a stream that ran through the back of her yard. An investigation uncovered a significant problem at a petroleum storage tank farm facility nearby. Shock became terror when the community learned that the plume of oil, estimated at 300,000 gallons, had leaked from the tank farm, under the adjacent four-lane highway, under the treed buffer area, under commercial properties along the highway and under 17 homes in the community.

How did the community suffer as private property owners? The properties over the plume suddenly became worth half of their value, adjacent homeowners saw their values reduced by 30 percent and the next ring of homeowners also experienced a loss in value. In the first 2 years of this disaster, Fairfax County lost over \$800,000 in real estate taxes.

The entire community was stigmatized. Prospective home buyers stayed away and real estate agents avoided the community. Five years after the oil leak was first discovered, 60 families who lived on streets directly affected by the spill have moved. The community is still fighting to restore its proud reputation. The situation should never have been permitted to occur. Had the oil company had monitoring wells on site, which they now have, they would have had

advanced knowledge of the leaks in time to correct them. We consider the regulation put in place following the disastrous leak to be private property protection legislation. The owners of the tank farm had a responsibility to operate a safe facility.

Takings legislation would require homeowners to pay to prevent having their property damaged by irresponsible neighbors. We feel this would represent an enormously unfair financial burden on the homeownership taxpayer.

Government at all levels must ensure basic safeguards so that people need not fear unnecessary damage by other property owners because they live downstream, downwind or downhill. The Mantua oil spill demonstrates the need for environmental protection laws to protect property rights in another respect as well.

Following the discovery of the spill, a number of homeowners filed suit based on Virginia nuisance law to recover loss of their property values. Unfortunately, last April, a Federal Appeals court rejected the suit and concluded that the homeowners could not recover for loss of value because the underground spill was not physically perceptible from the homeowners' property.

This result clearly demonstrates to us the inadequacy of nuisance law to protect homeowners and a need for reasonable across-the-board regulations and standards to meet today's problems. Common and codified law is full of examples of regulations preventing property owners from harming others or the community as a whole. For example, materials and practices which create fire hazards are regulated. The condition and operation of motor vehicles is regulated. At the national level, Clean Water legislation and other environmental laws protect our communities, our homes and our wallets.

To require homeowners to pay to prevent damage caused by irresponsible land use nearby will be costly, is unnecessary and goes against our basic American values of owning our own homes.

All property owners are and should be entitled to constitutional protection, but certain landowners should not be the beneficiaries of what we feel could be a new entitlement program that would pay them for the costs of complying with the standards that protect the majority—

Senator THURMOND. I believe your time is up. Are you about through?

Ms. PIERCE. One sentence. We believe this bill to be hurtful to our members as taxpayers and homeowners. Thank you very much.

Senator THURMOND. Thank you. Mr. Joseph Sax?

STATEMENT OF JOSEPH L. SAX

Mr. SAX. Mr. Chairman, I am Joseph Sax, counselor to Secretary Bruce Babbitt, Department of the Interior. Thank you for the opportunity to testify this morning.

In addition to my written statement, I would like to submit for the record testimony previously given by other Administration witnesses before the Committee on Environment and Public Works on this bill, S. 605, and other related bills.

Senator THURMOND. Without objection, they will be admitted.

Mr. SAX. Thank you, Mr. Chairman. In testifying today, my primary concern is to dispel the misconception that S. 605 does no

more than to implement or to reflect the private property protection embodied in the fifth amendment and also to speak about the nuisance defense.

On the contrary, S. 605 embodies a radical departure from the constitutional standard adopted by the Supreme Court. For 150 years, the interpretation and meaning of the takings provision of the Constitution has been vouched safe to the Supreme Court of the United States. All during that period, in every era and every Justice, with a remarkable degree of unanimity, regardless of their views otherwise, have interpreted the takings provision in a way that is inconsistent with each of the primary elements of this Bill S. 605. They have rejected the segmentation notion implicit in this bill under the affected portion language.

They have required that expectations be taken into account, which play no role in this bill. They have said the diminution of value alone, except where all value has been taken away, is not a sufficient standard.

They have rejected the notion that any single factor, such as diminution, is decisive, and they have said that nuisance need not be present in order to disallow compensation. It would be hard to find an issue of any kind of constitutional interpretation on which there has been such widespread unanimity. I would urge that the greatest caution be exercised before departing in the radical way that this bill does from the collective judgment and the collective wisdom of the court over so long a period and with such unvarying consistency.

I would like to turn now to the nuisance defense and to supplement the comments that were made earlier by Senator Biden. Section 605 contains a narrow exemption, which would avoid a duty to compensate if the regulated use constitutes a nuisance. The court has expressly rejected a taking standard that required a determination of whether a regulated activity was a nuisance according to the common law. Because so much conduct falls outside the scope of the nuisance doctrine, the court has routinely allowed regulation for conduct that was not a nuisance; destruction of diseased trees, liquor prohibition and conventional urban zoning.

Neither common law nuisance nor the novel formulations in other bills provide the public with adequate protection. Many environmentally harmful activities now regulated by Federal law are not nuisances in at least some states, though they may be nuisances in others. Of course, there would be an enormous divergence of result and lack of uniformity under this bill.

Some of them have been mentioned earlier; flooding caused by filling of adjacent property, hazardous waste contamination of property, ground water contamination, asbestos removal and contamination of a creek by a leaking landfill, all cases of pollution, all governed by Federal law. These are the examples that have led opponents of the bill to say that this bill would generate, in some circumstances, a duty to compensate polluters for not polluting, since nuisance law was never intended and has never served as a complete protection of all human health risks and other threats to the public welfare. Indeed, the reason Federal environmental laws were enacted in the first place was to address problems that were not being adequately addressed under state nuisance law in the

legislative history of the Clean Air Act and the Clean Water Act are explicit on that point.

There are several reasons why nuisance law has proved inadequate to control matters such as widespread pollution. Many of those were expressed by Senator Biden, the technical requirements of nuisance law. There are many critical Federal activities that are not governed by nuisance, but are governed by Federal law, interstate matters and others.

I see that my time has expired. Thank you.

[Mr. Sax submitted the following materials:]

Statement of

Joseph L. Sax
Counselor to the Secretary
U.S. Department of the Interior

Before the Senate Judiciary Committee

October 18, 1995

Mr. Chairman, and Members of the Committee Thank you for the opportunity to testify today on proposed compensation legislation, and on the extent to which such proposals depart from the constitutional standard set by the United States Supreme Court over the course of our national history. I want to call particular attention to the nuisance defense, and its insufficiency, as well as its potential for generating protracted and costly litigation

In this respect, I would like to call to your attention the recent testimony of Office of Management and Budget Director Alice Rivlin, before the Senate Environment and Public Works Committee, in which she estimated that the House-passed compensation bill (H.R. 9) would impose about \$28 billion in new costs over seven years, and that S. 605, if enacted, would potentially cost several times that amount. S. 605 would require payment in countless instances where an owner would not be entitled to compensation under the Constitution, and it would require Government to pay much more when it does compensate. It does this by requiring payment when regulation diminishes the value of any portion of property below its most profitable use, regardless of the illegality of that use or of the property owner's reasonable expectations. It would also allow recovery of lost business profits, a measure of recovery not permitted in compensation cases. S. 605 would thus grant windfalls to those who declare their intention to use their property in violation of federal law.

For these and other reasons, letters previously sent to you from many Executive Branch Departments have expressed strong opposition to S. 605, and have stated that if that bill in its current form or any similar legislation is sent to the President, a veto will be recommended.

This Administration is unqualifiedly committed to assuring protection of the rights of every property owner in accordance with the United States Constitution. I have therefore attached to my written statement a report on the administration of the Endangered Species Act from the Department of the Interior, detailing steps that have been taken to avoid untoward burdens on property owners. We believe that this approach, rather than radical legislative departures from constitutional standards, such as S. 605, is the appropriate way to meet the concerns and needs of property owners. I also have attached the annual report of the White House Interagency Wetlands Working Group detailing the Administration's commitment to meaningful wetlands reform.

In testifying today, my primary concern is to dispel the misconception that S. 605 does no more than to implement or reflect the private property protection embodied in the Fifth Amendment. On the contrary, S. 605 embodies an explicit departure from the constitutional standard adopted by the Supreme Court, and incorporates a standard that has been repeatedly rejected by the Court as inappropriate.

For more than 150 years, and in dozens of cases, the Supreme Court has spoken with extraordinary consistency on the fundamental rights of property owners. These decisions include both 5th Amendment "takings" cases as well as those that have arisen under the rubrics of due process, and the obligation of contract. Justices in every era and of all stripes of opinion, stretching all the way from Justice Taney in the Charles River Bridge¹ case in 1837, to the first Justice Harlan in Mugler,² and Justices Sutherland in Euclid,³ Stone in Miller v. Schoene,⁴ Holmes and Brandeis in Pennsylvania Coal⁵ and Holmes as well in Erie Railroad⁶ and Block,⁷ Brennan in Penn Central,⁸ Stevens in Keystone,⁹ Scalia in Nollan¹⁰ and Lucas,¹¹ Souter in Concrete Pipe,¹² and Rehnquist in Dolan,¹³ have sounded a consistent theme. While this is by no means the entire pantheon of cases and justices, it is strikingly illustrative of the singularity of view the Court has taken about the basic rights of property owners over virtually the whole of our nation's history. Taken together, this body of precedent offers the collective judgment of the Court as an institution, transcending particular differences among justices and the particular circumstances of a specific moment in the nation's history.

The Court's consensus has focused largely on the very issues raised by the pending legislation, issues such as diminution of value, segmentation of property, the importance of expectations in determining compensability, the effects of nuisance law on regulatory authority, and the limitations of a single, supposed "bright-line" standard.

The cornerstone of the Court's reasoning has been that each case must be considered on its own facts. The mechanical, one-size-fits-all language of S. 605, which mandates compensation when use of any "portion" of a property has been limited repudiates the Supreme Court's counsel to eschew set formulas and to recognize that the requirements of fairness can only be determined in the setting of a particular factual inquiry. S. 605 radically departs from and misapprehends the Constitutional approach in the way it addresses the following subjects:

¹ Charles River Bridge v. Warren Bridge, 36 U.S. 341 (1837).

² *Supra*.

³ Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

⁴ 276 U.S. 272 (1928).

⁵ Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1926).

⁶ Erie Railway Co. v. Board of Public Utility Commissioners, 254 U.S. 394 (1921).

⁷ Block v. Hirsh, 256 U.S. 135 (1921).

⁸ Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

⁹ Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

¹⁰ Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

¹¹ Lucas v. South Carolina Coastal Council, 112 S.Ct. 2886 (1992).

¹² Concrete Pipe & Products of California v. Construction Laborers Pension Trust for Southern California, 113 S.Ct. 2264 (1993).

¹³ Dolan v. City of Tigard, 114 S.Ct. 2309 (1994).

1. The Proposition that diminution in value alone--short of loss of all economic viability--is a key to compensation.

Bills that provide compensation based solely on reduction in value represent a departure from the Constitutional standard. Only two years ago, the Supreme Court unanimously stated that "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking."¹⁴ This reflects the Court's unwavering recognition that, while the extent of a reduction in value is relevant to determining whether an action works a taking, it is almost never decisive.

Under S. 605's mechanical approach, when a portion of property value can be shown to be reduced by 33%, an owner is automatically entitled to compensation (subject only to sharply limited defenses). It does not require consideration of the owner's reasonable expectations, or whether the owner can continue to earn a reasonable return from the property with the use restriction. It does not consider the impact of the proposed use on neighboring property owners or on the public at large. It may even encourage owners to seek approval for potentially lucrative uses they have no intention of undertaking. It does not even require the proposed use to be a legal one.

The mechanical formula in S. 605 also may allow claims that effectively turn a public subsidy into a compensable property right. One such example is illustrated by the Federal reclamation program. If the government orders individuals receiving water from a Federal reclamation project to stop practices that cause excessive runoff and resulting water pollution, S. 605 could be read to obligate the government to pay the water users the fair market value of the water, rather than its actual cost. Where users receive Federal reclamation water at subsidized rates, and the difference between subsidized and fair market rates is large, a substantial windfall should result. Notably, in some states, state laws expressly provide that such activity is not a nuisance, private or public.

2. An invitation to segment property, both by percentage diminution standards and by directing compensation to the "portion" of property affected by regulation.

In assessing the fairness of regulatory burdens on property, the Court has consistently examined the property as a whole, rather than segmenting it into smaller parts. The entire Court joined Justice Souter's recent reminder that "a claimant's parcel of property [can]not be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable ... [T]he relevant question is whether the property taken is all, or only a portion of the parcel in question."¹⁵ Even more recently, Chief Justice Rehnquist, writing for a majority, indicated there could be "no argument" to support a claim that a property owner has been denied all use of one portion of her property when she "operates a retail store on [another portion of] the lot."¹⁶

¹⁴ Concrete Pipe, supra, at 2291

¹⁵ Concrete Pipe, supra at 2290.

¹⁶ Dolan, supra, at 2316, n. 6.

A focus on the whole parcel, rather than just an affected portion, ensures fairness. Regulation that limits the use of part of a property, such as setback requirements, is almost universally accepted as fair to both the public and to property owners. Similarly, the owner of a large tract, some fraction of which has been subject to restrictions, is still likely to be able to make a productive and profitable use of the land. Indeed, with adaptive and innovative modern techniques stimulated by local land use regulation, such as clustering of housing units to preserve open space, owners often end up with developments that are highly profitable and attractive to buyers even though not every acre can be developed. Instead of recognizing these facts, S. 605 ignores them, and, in the process, encourages owners to "game the system" by rearranging ownership patterns and segmenting parcels to maximize claims, with compensation essentially from the first fractional loss, however small.

The "affected portion" standard for compensation in S. 605 and similar bills would generate claims even for very small impacts upon property. Where the affected portion of 100-acre tract may be just a one-acre segment of a 100-acre tract (and that is an example that was given during hearings on a similar bill in the House of Representatives), the portion in question is 1/3 of 1% of the whole.

3. The omission of reasonable expectations as a factor that undermines the significance of fairness as a standard for measuring property rights

As Justice Sutherland remarked in a celebrated passage in the Euclid case, some 70 years ago:

Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive ... While the meaning of Constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.¹⁷

The Supreme Court has consistently recognized the importance of a property owner's expectations in determining whether a regulation effects a taking of property. The Court has unanimously ruled that, when government acts consistently with an owner's reasonable, investment-backed expectations, there is no taking.¹⁸

More generally, the Court has followed the reasoning in Euclid and recognized that regulation of property is a fact of modern life, which informs the expectations of property owners when they invest in property. Very recently Justice Souter, writing for the entire Court, reiterated that "those who do business in [a] regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."¹⁹ This echoed Justice Scalia's recognition that a "property owner necessarily expects the use of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers."²⁰

¹⁷ Euclid, supra, at 387.

¹⁸ Ruckelshaus v. Monsanto, 467 U.S. 986 (1984).

¹⁹ Concrete Pipe, supra, at 2291.

²⁰ Lucas, 112 S. Ct. at 2899.

4. The effort to exalt nuisance into an all-embracing and exclusive defense to compensation.

Compensation bills contain narrow exemptions which would avoid a duty to compensate if the regulated use constitutes a nuisance.²¹ However, the Court has expressly rejected a takings standard that required a determination of whether regulated activity was "a nuisance according to the common law."²² Further, because so much conduct falls outside the scope of the nuisance doctrine, the Court has routinely allowed regulation for conduct that was not a nuisance--such as destruction of diseased trees,²³ liquor prohibition,²⁴ and conventional urban zoning.²⁵ Neither common law nuisance, nor the novel formulations in the House-passed bill provide the public with adequate protection.²⁶

Many environmentally harmful activities, now regulated by Federal law, are not nuisances in at least some states, among them the following: flooding caused by filling of adjacent property,²⁷ hazardous waste contamination of property,²⁸ groundwater contamination,²⁹ asbestos removal,³⁰ and contamination of a creek by a leaking landfill.³¹ State nuisance law was never intended, and has never served, as complete protection from all human health risks and other threats to public welfare. Indeed, the reason federal environmental laws were enacted in the first place was to address

²¹ The House-passed bill (H.R. 925) contains some additional exemptions, as for actions whose primary purpose is to prevent "identifiable" damages to "specific" properties, or an "identifiable hazard to public health or safety, the scope of which is uncertain and undefined.

²² Miller v. Schoene, 276 U.S. 272, 280 (1928).

²³ Ibid.

²⁴ Mugler v. Kansas, *supra*.

²⁵ Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

²⁶ Attached to this statement is a memorandum prepared in the Department of the Interior that discusses the scope of the nuisance exceptions in H.R. 925 and S. 605.

²⁷ Johnson v. Whitten, 384 A.2d 698, 700-01 (Me. 1978).

²⁸ American Glue and Resin, Inc. v. Air Products & Chemicals, Inc., 835 F.Supp. 36, 48-49 (D. Mass. 1993).

²⁹ Cereghino v. Boeing Co., 826 F.Supp. 1243, 1247 (D. Or. 1993).

³⁰ City of Manchester v. National Gypsum Co., 637 F.Supp. 646, 656 (D.R.I. 1986).

³¹ O'Leary v. Moyer's Landfill, Inc., 523 F.Supp. 642, 657-58 (E.D. Penn. 1981).

problems that were not being adequately addressed under state nuisance law³²

There are several reasons why nuisance law has proven inadequate to control matters such as widespread pollution that have subsequently been subject to regulatory legislation. It is often difficult to prove a causal link between the harm at issue and the conduct of a particular defendant. It may be equally difficult to establish that any defendant is causing a nuisance where serious cumulative harm is caused by several sources, none of which, by itself, would cause significant damage. Moreover, a nuisance defendant's conduct often must be substantial and continuing in order to constitute a nuisance, which renders nuisance law ill-equipped to prevent single or intermittent discharges of toxic pollutants. Further, a nuisance exception would not extend to many protections designed to address long-term health and safety risks. Nuisance law is also inadequate to protect those who might be particularly sensitive to the harmful health effects of pollution, including children and senior citizens. Finally, nuisance law is uncertain and complex, and it may be difficult to determine how, if at all, a state's nuisance law applies to a particular activity. As Dean Prosser put it, "there is perhaps no more impenetrable jungle in the entire law than...nuisance."³³

Furthermore, some critical public safety activities are governed solely by federal law, and thus would not qualify for a state law nuisance exemption. Such an exemption also would not extend to uniquely Federal functions such as regulation of interstate pollution, the conduct of foreign relations, and providing for the national defense. Had S. 605 been in effect during the Iran hostage crisis, federal seizure or freezing of Iranian assets could have given rise to numerous statutory compensation claims.

A nuisance exemption also fails to recognize that there are many important public interests that do not in any sense come within the scope of nuisance law and are also not fully addressed by state law. Thus S. 605 would likely require compensation for prohibitions on the sale of dangerous medical devices, explosives, or dangerous weapons, on suspension of an unsafe air carrier's operations, for orders directing motor carriers to stop using unsafe vehicles, and for worker safety rules.

Similarly, since the nuisance laws of few, if any states would provide that failing to provide access to disabled persons constitutes a nuisance, the costs of implementing the Americans with Disabilities Act would trigger compensation claims. Indeed, S. 605 may threaten many forms of civil rights protections. In the 1960s, segregationists argued that our landmark civil rights laws unreasonably restricted their property use, and that they should be compensated because they were required to integrate. That view has been rejected. A much different result could occur with respect to new civil rights protections if rigid compensation legislation were to replace the flexible Constitutional standards.

5. The effort to articulate a bright-line, one-size-fits-all test.

Even Justice Scalia, perhaps the member of the present Supreme Court most attracted to categorical solutions, sees categorical standards as limited to two very restricted types of cases, permanent physical invasion and regulation resulting in loss of economic viability. The Court, over the decades, has concluded that, in most other circumstances, the only way to determine fairness is through fact-specific, case-specific analysis. As the Court has said repeatedly, the key to determining compensation is "ad-hoc factual inquiry into the circumstances of each particular case."³⁴

³² See S. Doc. No. 63, 91st Cong., 2d Sess. 1679 (1970).

³³ W. Page Keeton et al., Prosser and Keeton on the Law of Torts, sec. 86 at 616 (5th ed. 1984).

³⁴ Concrete Pipe, supra, 113 S.Ct. at 2290.

Moreover, the purported clarity of a bright-line formula to settle compensation questions is largely illusory. S. 605, if enacted, will require the creation of large and costly bureaucracies in Federal agencies and departments in order to process and evaluate compensation requests. It seems likely to foster the emergence of a massive claims industry, providing much work for lawyers and appraisers.

Complicated and novel factual and legal questions will have to be resolved: What is an "affected portion of property"?³⁵ When has a law been administered "in a manner that has the least impact on private property owners' ... other legal rights"?³⁶ What is a "right to use or the right to receive water,"³⁷ as compared to a "water right" as understood in ordinary water law parlance? Agencies and courts will have to grapple with such novel interpretive for years, perhaps decades, under what has been put forward as a bright-line standard.

The consistent judgment of the Supreme Court spanning nearly the whole of the nation's history should sound a warning note against efforts to legislate a one-dimensional, one-size-fits-all, purported bright-line standard. The Court has shown that any such effort is destined to prove illusory. What is more, it would prove intensely mischievous, generating burgeoning litigation for years, if not decades, heavy costs to taxpayers, unwanted consequences, mountainous administrative burdens, and unintended windfall gains. We believe that targeted reform of specific programs, responsive to real and documented problems, is the right way to assure fairness to property owners, and most particularly to small owners. We believe the reforms we have put into effect, and those we have identified as worthy of legislative consideration, illustrate a more positive and fruitful approach. I am providing here for your information a brief description of those reforms, and of their present status.

³⁵ S. 605, sec. 204(a)(2)(D).

³⁶ S. 605, sec. 503(a)(2).

³⁷ S. 605, sec. 502(5)(C).

STATUS OF DEPARTMENT OF INTERIOR'S REFORM OF THE ESA

The Department of the Interior has in the past year and a half instituted a number of reforms to the Endangered Species Act, in addition to making a number of legislative recommendations to further improve the Act and its implementation. Many of these policies were announced in July 1994 and others were included in the Department's Statement of Principles on March 6, 1995. This is a brief summary of progress made on these reforms.

1. Base ESA decisions on sound and objective science

On July 1, 1994 the Service promulgated several policies (FR 59 34270-34275) ensuring that among other things the highest quality information would be used to develop and implement all ESA related activities. Requirements included peer review of listing rules and recovery plans, thus shifting the focus from what information is available at the time decisions are made, to the quality of the information used for the development and implementation of ESA related activities. These requirements will further validate the scientific underpinnings of these activities and unequivocally enhance the credibility of ESA decisions.

STATUS All listing rules and over 30 recovery plans have been peer reviewed since the inception of this new policy. In some cases (e.g., Steller's eider) the comment period has been extended to allow for formal peer review to be conducted.

2. Provide information to landowners at time of listing

Since July 1, 1994 the Service's policy (FR 59 34272) has been to identify those specific actions that would not be considered "take", to the extent known, at the time of listing. Most of these activities include historical land uses within the range of newly listed species, thus avoiding the immediate and complete disruption of economic activities within the range of these species. Furthermore, those actions that are known to be considered violations of take prohibitions have also been identified to the extent that they are known at the time of listing.

STATUS All listing (proposed and final) rules have included specific language delineating which actions are to be considered "take" and which would not constitute a prohibited act.

3. Small landowner/minimal impacts exemption to minimize social and economic impacts

On July 12, 1995 the Administration announced a regulatory proposal for the exemption of certain types of activities from the section 9 prohibitions for species listed as threatened. The proposal would exempt small landowners from the prohibitions of "take" under ESA for activities within lands of 5 acres or less that individually and cumulatively would not result in significant impacts to the species of concern.

STATUS On July 20, 1995 the Service published (FR 60 37419-37423) a proposed rule delineating the conditions under which those exemptions would take place assuring that the cumulative effects would not have lasting effects on the likelihood of survival and recovery of threatened species. The Service is evaluating the categorical exclusion of low impact HCPs from the requirements of incidental take permits under section 10(a)(1)(B) for the preparation of NEPA documentation. This will increase the flexibility at least for these almost non-consequential activities.

4. No-Take agreements

Often times there are alternatives to the development of resources for economic gain that would result in no take of listed species, however, in the past, these approaches had not been fully explored. The Service has entered into a number of No Take MOUs (especially in the SE) that delineate specific

STATUS At least 8 "no take" MOUs have been developed since the promulgation of these reforms. For example, the Service has entered into the Swan Valley Grizzly Bear Conservation cooperative agreement with the Forest Service, the Montana Department of Public Lands, and the Plum Creek Timber Company. This agreement provides section 9 protections for the State and the timber company while providing conservation actions for listed species and allowing normal timber harvesting operations.

5. Safe Harbor Policy

A number of policies and directives have been issued in the last two or three years but none is more direct than the "safe harbors" concept in providing certainty regarding future actions and the potential impacts of the ESA implementation on those actions. Basically, landowners/managers are protected against future restrictions for take above an established environmental baseline which is determined at the time of entering into the agreement. These "safe harbors" agreements are very popular in the Southeast where more than 15 such agreements have been finalized and many more are in the process of development.

STATUS Over 23 "safe harbors" agreements have been reached or are in the process of development.

6. "No Surprises" Policy

In July 1994, the Department of the Interior announced a "no surprises" policy regarding previously approved Habitat Conservation Plans. In a nutshell this policy stated that fully operational incidental take permits would not be required to be amended or expanded to include newly listed species that occurred within the permit area. The "no surprises" policy also provides some certainty to already permitted activities under the ESA from future requirements for mitigation for species covered by the issued permit or for requirements for mitigation to address any future listed species.

The Service's Candidate Species Guidance and Habitat Conservation Planning Guidance incorporate the "no surprises" policy relative to candidate species. Including candidate species in an HCP is strictly voluntary on the part of permit applicants. However, these two guidance policies provide that if an HCP addresses candidate species as if they were listed, the species subsequently become listed, they may be readily covered under the permit. Consequently, permittees avoid project delays and enjoy long-term certainty.

STATUS Since the promulgation of these policies at least 26 multi-species Habitat Conservation Plans have been developed or are in some stage of development and negotiation. Very likely these plans include species that currently are candidates for listing. By including these species in these plans in some cases the need for listing may be precluded or if listing is necessary the certainty regarding the permitted actions is built in the permit prior to listing.

7. Recovery Planning Improvements

The Service specifically issued a policy on recovery plan implementation and participation (FR 59 34272-34273). The main goal of this policy is to minimize the economic and social impacts of the implementation of recovery plans. This policy included several noticeable requirements such as:

- the diversification of the areas of expertise represented in recovery teams in order to adequately address in a comprehensive fashion the local perspective on the recovery of listed species,
- development of participation plans as a mechanism to involve the local stakeholders in the development of potential alternatives approaches to the recovery of listed species, and

- a definite timeline for the development of recovery plans (2-5 years) to provide some measure of certainty for all stakeholders on the recovery process timeline to aid in local planning efforts

STATUS Non-traditional areas of expertise represented in ESA recovery initiatives since the promulgation of the policy include engineers, hydrologists, lawyers, water developers, ranchers, hydropower, propagation specialists, silviculturists, timber industry, road engineers, range specialists, GIS specialists, County Extension agents, foresters, Hydro-economists, population ecologists, riparian ecologists, water planners, local governments, contaminants, and statisticians

8. Multispecies Recovery Plans

The Service's recovery plan policy (FR 59 34272-34273) also encouraged the use of a multi-species approach to the maximum extent practicable to increase the efficiency of the recovery process and harness all the limited resources available for recovery to achieve the highest return for the least expense.

STATUS Since the inception of the policy at least 7 multi-species recovery plans have been finalized or are in various stages of development

9. Provide state, tribal and local governments with opportunities to play a greater role in carrying out the ESA.

Several policies and agreements have been adopted or entered into designed to increase participation by State, tribal and local governments. These include the following

- Under the Service policy published July 1, 1994 (FR 59 34273) the Service is required to include local stakeholders in the recovery planning process. More importantly, their expertise is sought in order to develop recovery alternatives that while meeting the recovery goals of the species also minimize the socioeconomic impacts of the recovery process on the local communities
- On September 29, 1993 the Director signed an Order specifically dealing with the involvement of State agencies in ESA activities (Director's Order number 64). Furthermore, on July 1, 1994 a policy statement (FR 59 34274) was issued reaffirming the D O #64 and requiring State agency involvement in all aspects of recovery planning. This policy and Director's order expanded the level of expertise that would be brought to bear in dealing with the task of recovering listed species. Additionally, this would greatly enhance the efficiency of recovery efforts by providing closer coordination at both the Federal and State level
- Service candidate guidance emphasizes close coordination with States in identifying species that may warrant listing. No species will be placed on the candidate list without prior coordination with all the States in the species' range. This better ensures that the Service is in receipt of all available scientific and commercial information, ensures that the States are aware of the species' need for management, and enhances the likelihood that cooperative conservation actions can alleviate the causes for the species' decline and perhaps avert the need to list
- Tribal governments also possess much needed expertise and resources in terms of accomplishing ESA's goals. On August 31, 1995 the Service announced a new policy to enhance Native American tribal government participation in all aspects of the ESA. This will definitely enhance the quality of decisions made under the ESA but it will also ensure the continuity of an informal working relationship between the Service and the Tribal governments

STATUS To date since the inception of the new policies the Service has included different

stakeholders in over 380 recovery planning and/or implementation initiatives. For example, the Service has coordinated with the Menominee and Winnebago tribes to jointly conduct surveys for the presence of Churner blue butterflies and to establish guidelines for re-planting of native vegetation for logged areas within known localities to alleviate the effects to the species, while allowing logging in these areas.

10. Prevent species from becoming endangered or threatened

The Service has developed a Candidate Conservation MOU which establishes a group of cooperators that proposes to work together towards combining their resources and authorities to develop conservation initiatives for species that may become listed as threatened or endangered in the near future. By developing these strategies perhaps the need to list some of these species can be obviated, thus saving much needed resources for the recovery of already listed species.

STATUS Several important MOAs have been completed including the following

A MOA was completed to effect restoration and conservation actions that may preclude the need to list the robust redhorse. Cooperators include Federal agencies (FWS and NBS), State Agencies (GA, SC, and NC), power companies, and conservation groups (GA Wildlife Federation). This partnership will study propagation research to augment the population of this species and the potential for reintroduction efforts to be successful for the species.

A MOU has been completed among the FWS, Forest Service, and the Arkansas Fish and Game Commission to explore common-sense ways to reduce the vulnerability of this species in the long term. If successful this effort will preclude the need to list this species as a threatened or endangered species.

A MOU was signed among the FWS, Forest Service, Arkansas Fish and Game, and Oklahoma Fish and Game Departments to improve the status of the Caddo Mountain salamander to a point where listing it as threatened or endangered species would be precluded.

A MOU was signed between the FWS, NBS, and International Paper Company to survey and develop and implement conservation actions for candidate species such as Wherry's and white-topped pitcher plants on International Paper Company lands. Such actions may very well preclude the need to list any of these candidate species.

11. Section 4(d) Rules for Threatened Species

One of the most flexible, but little used provisions of the ESA is section 4(d). However, this provision has shown its worth in providing the necessary flexibility to effectively deal with protection of threatened species and regional economic development activities. An example of this flexibility is the northern spotted owl rule which releases approximately 80 percent of the privately held forest lands while protecting the owl. The Service encourages the development of section 4(d) special rules whenever appropriate.

12. Counterpart Section 7 Regulations

On August 4, 1995 the Service published (FR 60 39921-39925) a proposal to enact counterpart section 7 regulations with the purpose of streamlining the section 7 process for activities under the purview of the Forest Service and the Bureau of Land Management. This process, if approved, will greatly enhance the early consultation opportunities between these agencies and the Service, and provides for early consideration of listed species concerns before critical decisions are made.

13. Ecosystem approach

By adopting a policy of ecosystem management for the implementation of ESA activities (FR 59 34273-34274) the Service definitely has focused on the most efficient and effective approach to achieve the recovery of most listed species. This approach also encourages the inclusion of multiple species in each recovery effort, thus allowing for a comprehensive view of the recovery goals of multiple species.

STATUS Since the inception of this and related policies described herein, the efficiency in the use of resources from outside the Service has increased significantly. For example at least 30 status reviews have been conducted with the cooperation of one or more partners, 38 prelisting agreements have been entered into or are in development, 7 multi-species recovery plans have been or are being developed, 26 multi-species HCPs are final or in the process of being finalized, and 28 HCPs have included one or more partners besides the applicant.

14. Other Interagency Agreements

A variety of Memoranda of Understanding have been entered into by the Service and a multitude of agencies. Most notably are the following:

- The Interagency MOU on implementation of the ESA. This MOU states a commitment by the signatory agencies to utilize their authorities to further the purposes of the Act, take an ecosystem approach to the conservation of listed species, and among other things establish a national ESA interagency working group to provide a national forum for discussions regarding improvements to the implementation of the ESA provisions.
- Federal Native Plant Conservation MOU. This MOU's purpose is to establish a committee that will establish national priorities for the conservation of the Nation's flora. This will definitely enhance the coordination among land Federal landholders in regards to the conservation of native plant species including listed species.

ANNUAL REPORT OF THE WHITE HOUSE
INTERAGENCY WETLANDS WORKING GROUP

**TWO YEARS OF PROGRESS
MEETING OUR COMMITMENT FOR
WETLANDS REFORM**

Protecting America's Wetlands - A Fair, Flexible and Effective Approach
• August 1993 - August 1995 •

- ✓ **Exempt Prior Converted Cropland**
All USDA Designated Prior Converted Cropland Exempt From Clean Water Act - Final Rule Published 8/24/93
- ✓ **Increase Certainty and Flexibility for Identifying Wetlands**
USDA Identifies Wetlands on All Farm Lands - Agency Agreement - Effective 1/4/94
Increase Reliance on State and Private Wetlands Identifications - Proposed 3/14/95
Develop Appeals Procedure for Wetlands Identifications on Private Property - Proposal Published 7/19/95
- ✓ **Provide Relief for Homeowners Nationwide**
Home-Related Construction in Wetlands Approved by Nationwide Permit - Issued 7/19/95
- ✓ **Streamline Processing for Private Landowners**
Streamlined Permit Review for Home, Farm, and Small Business Construction in Wetlands - Issued 3/6/95
Increased Flexibility for All Projects with Minor Environmental Impacts - Issued 8/24/95
- ✓ **Increase Incentives for Farmers**
Wetland Reserve Program Expanded to 50 States
- ✓ **Simplify Mitigation Through "Banking"**
Encourage Expanded Use of "Mitigation Banking" - Issued 8/24/93
Number of Banks has Doubled to 200 since 3/93
- ✓ **Clarify Regulated Activities**
Final Excavation Rule - Published 3/25/93
- ✓ **Empower State and Local Governments**
New Jersey Assumption - Approved 3/2/94
EPA Grants Program Increased to \$15 million
14 States Adopted Programmatic General Permits (PGPs) to Reduce Federal/State Overlap
Two-Day Workshop on PGPs With the States
- ✓ **Improve Efficiency of Permitting**
40,000 Activities Approved by General Permit in Average of 16 Days
4,000 Individual Permits Issued in Average of 127 days -- More than 90% Approved
Only 358 Permits Denied (0.4%)
Number of Permits Pending Longer than Two Years Reduced by 70% to just 41
- ✓ **Improve Environmental Protection**
Current Estimate of Wetlands Loss is 80-90,000 Acres/Year vs. 290,000 Acres/Year in the Mid-1970s

TWO YEARS OF PROGRESS MEETING OUR COMMITMENT FOR WETLANDS REFORM

Protecting America's Wetlands: A Fair, Flexible and Effective Approach

• August 1993 - August 1995 •

Shortly after coming into office, the Clinton Administration convened an interagency group to address legitimate concerns with Federal wetlands policy. After hearing from States, developers, farmers, environmental interests, members of Congress, and scientists, the group completed a 40-point plan identifying actions to enhance wetlands protection while making wetlands regulation more fair and flexible.

The Administration Wetlands Plan was issued in August 1993. In the two years since it was developed, many proposals from the plan have been implemented -- streamlining the wetlands permitting program, responding to the concerns of farmers and small landowners, improving cooperation with private landowners to protect and restore wetlands, and increasing the role of State, local, and Tribal governments in wetlands protection. While our work is not completed, our efforts to date demonstrate that the Clinton Administration is meeting its commitment for meaningful wetlands reform.

ACTIONS TAKEN TO INCREASE FLEXIBILITY AND ENSURE FAIRNESS

Exempt Prior Converted Cropland

To make the Federal wetlands program more consistent and predictable for farmers, the Clinton Administration clarified that "prior converted croplands" are not subject to regulation under Section 404 of the Clean Water Act. Nearly 53 million acres of farm land are covered by this action which exempted lands that no longer perform the wetlands functions as they did in their natural condition. Prior converted croplands are wetlands which were converted to agriculture prior to the passage of the Food Security Act of 1985, which established the Swampbuster program.

Establish Appeals for Landowners

The Clinton Administration also proposed an appeals process allowing landowners to appeal wetlands identifications and permit denials, without costly and time-consuming court battles. Once regulations are in place, landowners can have their wetlands determinations or permit denials reviewed by officials at higher levels in the agencies thereby avoiding the expense and delay of formal litigation.

Increase Certainty and Flexibility for Identifying Wetlands

For those farmers with wetlands on their property, the Clinton Administration has simplified wetlands identifications and increased certainty for permit applicants. Farmers can now rely on a single wetlands determination by USDA on farm lands for *both* Food Security Act and Clean Water Act programs. This action reduces duplication and increases consistency across the two programs.

In addition, in 1995, the Clinton Administration took action to provide additional certainty and flexibility to applicants. The Administration has proposed to increase its reliance on State and private wetlands identifications through a certification process. For most States, this enables landowners to rely on a single wetlands determination for both Federal and State programs.

General Approval for Homeowners Nationwide

In 1995, an approval process was set up that allows landowners to affect up to one-half acre of non-tidal wetlands for construction of single-family homes without applying for an individual Section 404 permit. This action eliminates unnecessary burden for families trying to build or add on to an existing home in wetlands on their property. The general permit also covers common features such as garages, driveways, storage sheds, yards, and septic tanks. This new general permit joins hundreds of others under which tens of thousands of activities in wetlands with minor impacts are rapidly processed each year, without an individual application and often without any required notification.

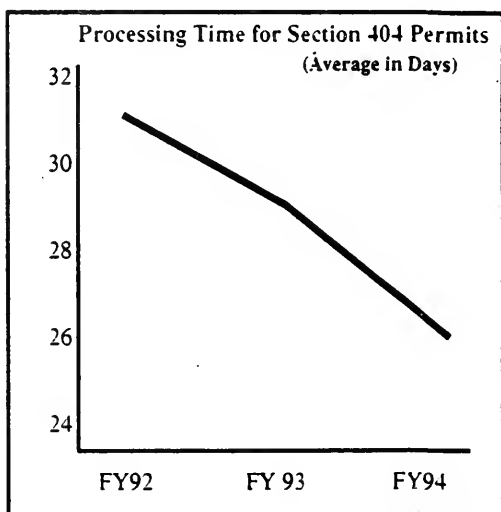
Streamline Processing for Private Landowners

The Clinton Administration has simplified the process for landowners proposing activities in wetlands on their property. Landowners who wish to expand or construct homes, build farm structures, or expand small businesses when those activities will affect less than two acres of wetlands, will no longer have to consider alternative locations to avoid wetland impacts on-site. For these activities, landowners need only consider opportunities that allow the project to proceed while reducing environmental impacts.

The Clinton Administration also recognizes that all wetlands do not have the same value and, therefore, should not be regulated uniformly. The agencies have been directed to ensure that the level of review of projects proposed in wetlands is consistent with anticipated environmental impacts. Small projects with minor impacts will now require far less review than larger projects with more substantial impacts and those affecting high value wetlands. The result is reduced cost, less delay, and greater certainty for private landowners seeking permits.

Improve Efficiency of Permitting

The permitting process has been streamlined to increase efficiency for all permit applicants. In 1994, over 40,000 activities were approved under general permits in an average time of just 16 days. It is estimated that another 50,000 activities are covered each year by general permits that do not require the public to notify the Federal government at all. Of those activities requiring a more detailed individual evaluation, more than ninety percent were approved and processing took an average of 127 days. Only 358, less than one percent of all Section 404 applications, were denied. In addition, progress has been made in reducing the backlog of permit evaluations more than two years old. In the last year, those applications have been reduced by 70 percent, from 202 to just 41.



Empower State and Local Governments

The Clinton Administration agrees that wetlands issues are often most effectively addressed at State, local, and Tribal levels. As a result, federal agencies are working with State, local, and Tribal governments to take a greater role in protecting and managing their wetland resources. Efforts to increase State participation have been successful, and in 1994, New Jersey became the second State to formally assume responsibility for the Section 404 permit program.

States are also being encouraged to develop State Programmatic General Permits (SPGPs) to reduce duplication between State and Federal programs. Nationally, thousands of activities are processed by States rather than the Federal government under this mechanism. This tool offers an alternative to those States wishing to take a more active role in wetlands protection without taking on the entire permit program. Fourteen States have currently adopted SPGPs. To enhance these efforts, in May 1995, Federal agencies hosted a two-day workshop with the States on the development of SPGPs.

The State Wetland Grant Program continues to be very effective in helping States and Tribes develop comprehensive wetland programs. The State Grant Program grew from \$1 million in FY90 to \$15 million in FY95. It has funded the development and implementation of State Wetland Conservation Plans, Watershed Planning Projects, State assumption assistance and wetland water quality standards.

Simplify Mitigation Through "Banking"

To improve the effectiveness of wetlands mitigation efforts and inject more flexibility into the regulatory process, the Clinton Administration has taken steps to encourage the use of wetlands mitigation banks. "Mitigation" is the practice of off-setting, to the extent practicable, authorized wetlands losses through the restoration, creation, or enhancement of wetlands. Banks give greater flexibility to permit applicants by providing opportunities for wetlands mitigation more easily, at reduced cost, and with a greater certainty of success. A combination of larger scale, improved siting, and professional design and operation increase the likelihood of success for mitigation undertaken by banks, benefiting the environment as well. These latest efforts will speed up the approval process for proposed banks. Progress has already been made since August 1993, with the doubling of the number of banks from 100 to 200.

ACTIONS TAKEN TO ENHANCE EFFECTIVENESS

Incentives for Farmers

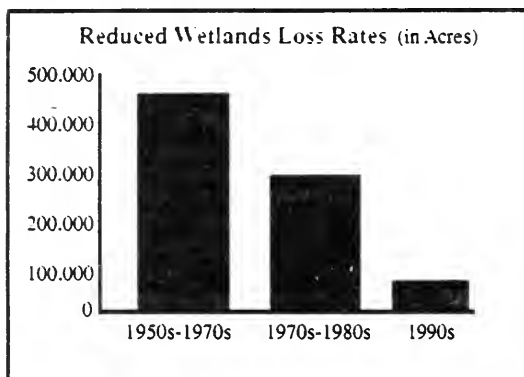
In an effort to provide economic assistance to farmers to restore and preserve wetlands on their property, the Wetlands Reserve Program (WRP) was expanded to cover all 50 states. The WRP assists farmers interested in restoring wetlands on their property by offering cash payments for placing conservation easements on their wetland property, as well as cost-sharing assistance for restoration work. Since 1990, this highly successful program has enrolled 125,000 acres of wetlands and associated buffer areas for restoration by approximately 650 farmers. With 1995 funds, USDA plans to enroll an additional 118,000 acres of wetlands in the program.

Clarify Regulated Activities

In an effort to improve protection of wetlands and increase fairness, the Clinton Administration closed a loophole that had previously allowed the destruction of thousands of acres of valuable wetlands each year from those engaging in actions involving small discharges of dredged or fill material that result in significant environmental degradation. This action clarified that regardless of the complicated and typically expensive methods being used by some to avoid regulation, activities that destroy wetlands such as excavation and landclearing do require a permit. This action does, however, explicitly exclude activities with only inconsequential environmental effects -- a common sense, risk-based approach to regulating

Reduced "Net" Losses

Progress is being made to improve environmental protection. According to the most recent estimates on the rate of wetlands loss, from 1982 to 1992, approximately 70,000 to 90,000 acres of wetlands were lost each year on non-federal lands. That figure demonstrates improvement since the 1950s to



1970s when approximately 458,000 acres of wetlands were lost annually nationwide, and since the 1970s to 1980s when almost 290,000 acres of wetlands were lost per year. These figures reflect the effectiveness of a combination of programs which are reducing losses and fostering wetlands restoration, including the Clean Water Act, Swampbuster, on-going public and private wetlands restoration programs, and active State, local, and private wetlands protection efforts. By continuing these efforts, the goal of "no net loss" is achievable.

Expand Public Outreach Efforts

The toll-free Wetlands Information Hotline has provided information about wetlands functions, protection, and regulation to approximately 40,000 callers -- including students, teachers, farmers, landowners, State and local government officials, and consultants -- since it was established in 1991.

In addition, outreach to landowners has been expanded to identify and implement practical and cost-effective opportunities for protection of wetlands on private lands. Nonprofit organizations, States, local agencies, and landowners have worked with the Clinton Administration to address the needs of private landowners.

SUMMARY

The Clinton Administration is committed to improving wetlands programs, making them more fair and flexible for landowners and more effective. Through the August 1993 Administration Wetlands Plan, we are seeing results. Programs are working better and burdens on the public have been reduced. Additional improvements can and will be made as the other initiatives in the Administration Wetlands Plan are completed.

MEMO ON THE NUISANCE EXCEPTIONS
IN H.R. 925 AND S. 605

Introduction

Both the House-passed and Senate "takings" bills (H.R. 925, S. 605) use a nuisance exception to limit the compensation obligation they establish for government actions that diminish property values. The two bills differ in their specific language. H.R. 925 says "[i]f a use is a nuisance as defined by the law of a State...no compensation shall be made." (sec. 4).¹ S. 605 provides "[n]o compensation shall be required...if the owner's use...is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated." (sec. 204(d)(1)).

These are among the most important provisions of the bills, for they define the universe of compensable regulation. Those whose "use is a nuisance" will not be compensated, no matter how extensive the economic burden regulation imposes. Since "nuisance" is a familiar legal term of art, it may seem that a nuisance test would provide a clear test for compensation, and would definitively identify those owners whose activities are undeserving of compensation.

Unfortunately, that is not the case. The main reason is that nuisance law is full of restrictive technical requirements, with the result that much harmful conduct that is the subject of modern regulation is not legally a nuisance. In practice, few owners are likely to be denied compensation under these bills, however harmful and unjustified their conduct. A number of illustrative examples are noted below to show the difficulty of proving a use to be a nuisance.

The bills also present a variety of other interpretive difficulties that make them anything but "bright line" guides to compensability. For example, is the nuisance exception meant to

¹ H.R. 925 also provides that compensation shall not be paid where the "primary purpose" of the limitation on the use of property is to prevent an identifiable "hazard to public health or safety" or identifiable "damage to specific property other than the property whose use is limited." (sec. 5(a)). What regulations would not trigger the nuisance exception of H.R. 925, but would trigger its hazard or damage exceptions is not clear.

require a showing that the activity in question meets the technical standards of state nuisance law (as assumed in the preceding paragraph), or is it enough simply to show that the activity is 'nuisance-like'? If the former, as noted, the exception is very narrow. If the latter, it is very vague and uncertain.

There are other interpretive problems. For example, is it enough that the conduct would be a nuisance in some circumstances, though not in the particular circumstances of the case presented (see "Hazardous Waste in California", p. 5)? Is it enough that the conduct had been (or might have been) a nuisance previously, but state nuisance law is deemed preempted by the existence of Federal regulation (see p. 8)? These are only a few of numerous unanswered questions that assure plentiful dispute, confusion, and litigation over the nuisance exception should either H.R. 925 or S. 605 be enacted.

It should also be noted at the outset that while the drafters of the bills have appropriated some language from Supreme Court opinions, they have distinctly not adopted the Court's constitutional standard for determining when compensation is due. The Supreme Court has never said that compensation must be paid for value-diminishing regulation unless the conduct in question is a state-law nuisance. For example, the nuisance-oriented standard of the *Lucas*² case--language from which is picked up in S. 605--was only applied by the Supreme Court to the extreme and rare case where regulation deprives an owner of all economically beneficial use of land. The Senate bill would apply the *Lucas* language to a far more expansive range of regulation than the Supreme Court has done.

Indeed, the Court has not applied a formal nuisance standard at all to most regulation. In its 1987 decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,³ the Court said that in determining whether compensation must be paid for a regulation it is not necessary to "weigh with nicety the question whether the [regulated uses] constitute a nuisance according to the common law."⁴ Compensation is not required so long as "the State merely restrains uses of property that are tantamount to public nuisances...."⁵ Over the years, the Court has found the following uses, none of them nuisances at common law, all to be "tantamount to public nuisances" and thus amenable to regulation

² 112 S.Ct. 2886 (1992).

³ 107 S.Ct. 1232 (1987).

⁴ p. 1244.

⁵ p. 1245 (emphasis added).

without compensation: a brewery, legal when built, that was made less valuable by the enactment of a liquor prohibition law; cedar trees that were spreading a disease to nearby apple orchards; and land slated for commercial development that was zoned for less profitable development than the unrestrained market would have allowed.

What is Nuisance?

The essence of private nuisance is an interference by use on one property with the use and enjoyment of the land of another. The injury is not to the property owner, but to rights that attend property ownership--rights to the unimpaired condition of the property as well as reasonable comfort and convenience in its occupation. Paradoxically, nuisance is both extremely open-ended and uncertain in the scope of its coverage, and at the same time is encumbered with rigid technical rules that sharply limit its application. Dean Prosser in his treatise says "there is perhaps no more impenetrable jungle in the entire law than ... nuisance."⁶ While almost anything could be a nuisance, a great many of the most serious modern harms have not been susceptible of redress under the doctrine because of its technical limits, its requirements of proof, and the remedies it offers.

It is often said that modern regulatory statutes have been enacted precisely because nuisance law is poorly-suited to meet the increasingly complex problems of modern life, with sophisticated synthetic chemical products, and the complex risks they may create.⁷ Indeed, the legislative histories of the major environmental statutes confirm that Congress was concerned about the limitations of state nuisance law when it enacted laws to provide Federal protection of human health, public safety, the environment, and other important interests where state nuisance law was inadequate to the task.

For example, the legislative history of the Clean Air Act contains a report by the Secretary of Health, Education and Welfare regarding the problems of air pollution from stationary sources. The report discusses a rendering plant in Bishop, Maryland, and describes how malodorous emissions from the plant had endangered the health and welfare of the residents of

⁶ W. Page Keeton et al., Prosser and Keeton on the Law of Torts, sec. 86, at 616 (5th ed. 1984).

⁷ See, e.g., Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 Colum. J. Envtl. L. 1, 7 n. 34 (1993); Rabin, *Environmental Liability and the Tort System*, 24 Hous. L. Rev. 27, 28 (1987); Rabin, *Federal Regulation in Historical Perspective*, 38 Stan. L. Rev. 1189, 1282-83 (1986).

Shelbyville and adjacent areas for some 15 years. Adverse health effects included "nausea, vomiting, lack of appetite; gasping, labored breathing, irritation of nose and throat, aggravation of respiratory ailments; emotional or nervous upsets ranging from anger to mental depression; and headaches, general discomfort, or interference with the ability to work or to enjoy homes and property." The offensive emissions also "discouraged industrial and business development, depressed property values, diminished real estate sales, [and] decreased business volume...." The report concluded that state nuisance law was inadequate to address these severe dangers to health and welfare:

Bishop Processing Company's dry rendering plant has had problems with malodors since it became operational in 1955. Officials from Delaware and Maryland recommended corrections but all efforts to obtain abatement by local and State officials through public nuisance laws have been fruitless.⁶

In 1979 the Senate heard testimony about the pollution of Alabama's Warrior River and its tributaries by seventeen industries and the resulting harm to riparian owners:

There was every sort of polluter involved in that case, just about. They continued to pollute. Why? Because we could not find a successful vehicle under the common law, under nuisance law, that would adequately protect these individuals.⁷

The cases set out below provide concrete examples illustrating some of the inadequacies of state nuisance law that have impelled Congress to provide Federal regulation.

The Technical Limits of Nuisance Law

The following are illustrative--but by no means exhaustive--examples of harmful conduct that are the subjects of Federal regulation, but are not considered nuisances under the law of one or more states. In each case, since the use does not constitute a state law nuisance, the Federal regulation would likely give rise to a claim for compensation under the bills now before Congress.

⁶ S. Doc. No. 63, 91st Cong., 2d Sess. 1679 (1970).

⁷ Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess., pt. 4, 693 (1979).

Wetland Filling in Maine: Plaintiff and defendant were abutting landowners in Winter Harbor, Maine. Water drained across plaintiff's land and onto the defendant's land, though there were no serious problems of water accumulation on defendant's land. Before the advent of the 404 program, defendant filled a part of his land, constructing a barrier that impeded the natural flow of drainage from the plaintiff's land onto his land. As a result, water backed up onto plaintiff's land, flooding plaintiff's basement at times of heavy rain. Plaintiff sued, claiming a nuisance. The Maine Supreme Court said there was no nuisance. If you obstruct the flow of water (as defendant did), rather than collecting and discharging it (as in a ditch), it is not a nuisance, though your neighbor is equally harmed either way.¹⁰

Land Subsidence from Mining in West Virginia: Coal mining caused subsidence which ruptured gas, power, and water lines, and opened cracks in the earth that were safety hazards. Previous owners of surface lands had sold to coal companies their property right against subsidence years earlier. Because nuisance is a property owner's legal claim, and the surface owners no longer had a property interest to assert, there was no nuisance. Moreover, there was apparently no violation of state regulatory law. But there was a hazard to public health and safety, which was finally cured by a cessation order issued by the Federal Office of Surface Mining under Federal law.¹¹

Groundwater Contamination in Oregon: In the 1960's and 1970's an industry disposed of industrial solvents (TCE and TCA) which migrated onto, and contaminated, the farmer plaintiff's groundwater. The contamination was not discovered until 1986. The farmer sued in nuisance, but was thrown out of court because an Oregon statute does not allow nuisance suits to be brought more than 10 years after the event claimed to be a nuisance. The defendant was, however, subjected to remediation under an order issued by the Federal EPA.¹²

Hazardous Waste in California: A former owner had left hazardous substances on the property and the current owner sought to recover from it the cost of cleanup by claiming a nuisance. But the court held that an act committed on your own property isn't a nuisance. A nuisance is an act committed on one property that

¹⁰ Johnson v. Whitten, 384 A.2d 698 (Me. 1978). See generally, Martin J. McMahon, Jr., Liability for Diversion of Surface Waters by Raising Surface Level of Ground, 88 A.L.R. 891, 897-98.

¹¹ M & J Coal Co. v. United States, 47 F.3d 1148 (Fed. Cir. 1995).

¹² Cereghino v. Boeing Co., 826 F. Supp. 1243 (D. Or. 1993).

interferes with the use of another property. The former owner was subjected to regulation under both CERCLA and RCRA.¹³

A similar case arose in Massachusetts when a landowner tried to recover in nuisance from a company that had spilled chemicals on its property in the course of deliveries. The suit was dismissed because nuisance only deals with interference by a use one owner makes of his property with the use and enjoyment of the property of another.¹⁴

Asbestos Removal in Rhode Island: A City sued asbestos manufacturers in nuisance for the cost of having to remove asbestos from schools and other public buildings. The suit was dismissed because under the law of nuisance a defendant must be in control over the instrumentality that constitutes the nuisance, and here the manufacturer, having already sold the asbestos, no longer had control over it.¹⁵

Problems of Proof in Nuisance Law

Even if all of the arcane, technical limitations on a nuisance action, some of which have just been pointed out, are overcome, impediments to a successful suit remain. The most onerous of these is proof. Indeed, nowhere is the limit of nuisance clearer than in the standard of proof of harm required in nuisance law, as compared to standards of proof deemed appropriate for regulatory regimes, as illustrated by the following case:

Leaking Landfill in Pennsylvania: A landfill discharged hundreds of thousands of gallons of foul-smelling leachate every year. Neighbors brought a nuisance action claiming contamination of a nearby creek and of drinking water. The State Department of Environmental Resources issued an order directing correction of the discharging activity, but the court found insufficient evidence of harm under the standards of common law nuisance to support a nuisance suit, and made the following observation:

Plaintiff's failure to make out the nuisance claims is no indication of the potential hazards posed by the landfill. Witnesses expert in water and solid waste management and toxicology noted the risks posed by leachate containing

¹³ In re Cottonwood Canyon Land Co., 146 B.R. 992, 36 ERC 1304, 23 Bankr.Ct.D. 1010 (U.S. Bankruptcy Court, D. Colo. 1992).

¹⁴ American Glue & Resin, Inc. v. Air Products & Chemicals, Inc., 835 F. Supp. 36 (D. Mass. 1993).

¹⁵ City of Manchester v. National Gypsum Company, 637 F.Supp. 646 (D. R.I. 1986).

known and suspected carcinogens.... In short, the harm caused by the landfill's discharges, toxic and otherwise, is not proved and not known. These failures of proof are fatal to the common law negligence and nuisance allegations of the present complaint.¹⁶

These same proof problems were noted by Members of Congress when it considered Superfund legislation. Senator Javits, for example, opined that a Federal statute "is so much better" than state nuisance law in addressing the problem of toxic and hazardous wastes. He warned that lawsuits based on nuisance would "take 20 years in the sense that [it is] very, very difficult to prove that buried drums were the cause of a public nuisance...."¹⁷

Remedies Provided by Nuisance Law

The limited availability of remedies, and the limitations inherent in those that are available, renders nuisance often unhelpful in dealing with the harms which are addressed by Federal regulation. Much Federal regulation aims to prevent harm before it occurs. Nuisance, in contrast, is in many ways a backward-looking doctrine that usually comes into play only after harm has already occurred. In cases of private nuisance, money damages are usually the only remedy available. More often than not, a court will refuse to order the abatement of a private nuisance.¹⁸ Injunctive relief is generally limited to cases of public nuisance, but often is available only after harm has already been done. Although a court can enjoin a prospective nuisance, it can only do so upon finding it "highly probable" that the activity will lead to substantial injury.¹⁹ This stringent standard for issuing an injunction makes nuisance law especially ill equipped to deal with modern toxic and environmental risks.

¹⁶ O'Leary v. Moyer's Landfill, Inc., 523 F. Supp. 642, 658 (E.D. Pa. 1981).

¹⁷ Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess., pt. 1, 246 (1979).

¹⁸ W. Page Keeton Et al., Prosser and Keeton on the Law of Torts, sec. 87, at 623 (5th ed. 1984).

¹⁹ William L. Prosser, Handbook of the Law of Torts, sec. 90, at 603 (4th ed. 1971).

The analysis it dictates requires courts to engage in the sort of risk assessment that is more appropriate to legislatures. Legislatures not only have the technical and scientific expertise readily at hand to enable them to consider such problems, but they are also called upon to make value judgments about what risks to human life and health society is willing to accept. Furthermore, if a decision is going to be made that the public has to bear the risks of a certain pollution-generating activity, it is more appropriate for legislatures than courts to assign such risk. Also, some regulation sets tolerable risk levels through "technology forcing standards" that require industry to develop technologies that will minimize or eliminate risks altogether. While courts may be theoretically capable of bringing about such desirable technological innovation in their adjudication of nuisance actions by, for example, issuing an increasingly stringent pollution abatement schedule, they lack the technical expertise needed to construct and supervise such regulatory regimes effectively.²⁰ For all these reasons, judicially fashioned nuisance law has not developed sufficiently to cover many of the problems addressed by modern regulatory programs.

This limitation of nuisance is magnified when it comes to cumulative and long term impacts. Frequently, the action of an individual polluter does not cause harm, but if several people take similar action, the combined effect can be devastating. In the typical nuisance case, though, a court will only have one defendant before it; namely, the party alleged to be creating a nuisance by the use of its property. In this traditional two-party context, the problem of cumulative impacts cannot be adequately addressed. All of the above problems of proof are, understandably, even more difficult in cases of long-term harm, where the ill effects of toxics and pollution may not appear for many years.

Preemption of Nuisance by Federal Regulatory Law

Sometimes conduct that would have been a nuisance is no longer a nuisance because courts hold that the very existence of a regulatory regime has, and was intended to, displace common law remedies like nuisance. This situation could result in a most

²⁰ Courts themselves have not hesitated to point out the limitations of nuisance in addressing modern environmental harms and have expressed diffidence about their own capacity to protect the public from such harms through the adjudication of nuisance actions. See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. Ct. App. 1970); *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 658 n. 40 (E.D. Pa. 1981); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 717 (Mich. 1992).

ironic outcome under the bills now before Congress where non-compensability under the regulatory regime may depend on the existence of a common law nuisance.

Radio Signals in Michigan: Residents of Oak Park, Michigan sued in nuisance, complaining that the defendant radio station's signals were interfering with operation of their home electronic equipment. Their case was dismissed on the ground that the Federal Communications Act preempted state nuisance law in the area of radio frequency interference.²¹ The residents were able to get the FCC to intervene, and it ordered the station to take costly measures to eliminate the problem. Had S. 605 been law, the FCC action could have been compensable because the nuisance exception might not have been available.

Airport Noise in Chicago: Landowners near airports can't bring nuisance actions concerning the number of flights per hour, aircraft technology, or takeoff angle of planes because such subjects are the exclusive province of the FAA.²²

Preemption and Interstate Nuisance

Interstate pollution is peculiarly a subject for Federal law. Bills like S. 605 seem not to take account of this fact. For example, interstate water pollution was traditionally governed by a Federal common law of nuisance. The Supreme Court has now held that the Clean Water Act preempted the Federal common law of nuisance.²³

While state nuisance law still exists, the Supreme Court has ruled that only the law of the state that is the source of the pollution is applicable.²⁴ This ruling potentially presents a quite troublesome situation. For example, under the Clean Water Act, the EPA can (and perhaps must) refuse to issue a discharge permit if the discharge would violate a downstream state's water quality standards.²⁵ Under section 204(d)(1) of S. 605, however, compensation may be required for such a refusal unless

²¹ Broyde v. Gotham Tower, Inc., 13 F.3d 994, 997-98 (6th Cir. 1994), cert. denied 114 S.Ct. 2137 (1994).

²² Bieneman v. City of Chicago, 864 F.2d 463, 473 (7th Cir., 1988), cert. denied 109 S.Ct. 2099, 2100 (1989).

²³ Illinois v. Milwaukee, 101 S.Ct. 1784 (1981).

²⁴ International Paper Co. v. Ouellette, 107 S.Ct. 805, 809, 812 (1987).

²⁵ Arkansas v. Oklahoma, 112 S.Ct. 1046, 1056 (1992).

the discharge constitutes a nuisance in the state "in which the property is situated" (the source state). In such circumstances, the discharger seeking a permit is unlikely to be violating its own (source) state's law. S. 605 could thus interfere with the administration of interstate pollution law under the Clean Water Act.

Nuisance and the Background Principles of Nuisance

So far this memo has assumed that the nuisance exception in the bills before Congress would require a showing that a regulated activity meets all the technical standards of nuisance in order for the exception to be triggered. That seems to be the standard of H.R. 925;²⁶ it is less certain as to S. 605 which refers to the background principles of nuisance and property law. It is possible that the bills (and particularly S. 605) intend to impose a less technically rigorous standard, and that it would be enough to show 'nuisance-like' conduct to avoid the compensation requirement.²⁷ If so, a problem of a quite different sort is presented. The issue would no longer be whether conduct meets the many technical requirements of nuisance, but rather the vague and open-ended question: What is the scope of the phrase "a nuisance as commonly understood and defined by background principles of nuisance and property law?"

Should this be the question presented by the bill, all hope of a bright-line, simple, and straightforward compensation law will quickly evaporate. It would be hard to imagine a standard more prone to produce extensive litigation and uncertainty, precisely the goal the proponents of the bills say they want to avoid.

Perhaps the best way to illustrate what is likely to be in store is by looking back to the Supreme Court's decision in the 1987 case, *Keystone Bituminous Coal Association v. DeBenedictis*.²⁸ The case involved a state law regulating coal mining in order to prevent surface subsidence. The Justices divided 5-4. In effect the question before them was whether the state was engaged in

²⁶ As noted above, whether a regulated activity falls within the limited section 5(a) hazard or damage exceptions is a question that will have to be answered as well.

²⁷ However, section 501(6) speaks about compliance "with current nuisance laws," which seems more directed to technical nuisance.

²⁸ 107 S.Ct. 1232 (1987).

abating activity "akin to a public nuisance."²⁹ Justice Stevens and four of his colleagues found that Pennsylvania was merely restraining "uses of property that are tantamount to public nuisances"³⁰ and that it is not necessary to "weigh with nicety the question whether [the activity] constitute[s] a nuisance according to common law."³¹ Chief Justice Rehnquist and three of his colleagues insisted, on the contrary, that "[t]his statute is not the type of regulation that our precedents have held to be within the 'nuisance exception' to takings analysis."³²

If the Justices of the United States Supreme Court have to struggle so much to determine where to draw the line over the nuisance principle, one can only imagine what the claims process would look like under an enacted S. 605.

Public and Private Nuisance

Public and private nuisance are two quite different legal wrongs. Neither H.R. 925 nor S. 605 distinguishes between them, and presumably the use of the term nuisance in both bills is meant to embrace both public and private nuisance. While most of the discussion above is directed to private nuisance, the same basic point applies to both public and private nuisance. That is, both have certain technical requirements that have to be met, or a nuisance claim will be dismissed by a court.

Public nuisance interferes with the exercise of public rights (rather than private property rights). Widely disseminated water and air pollution can be public nuisances, and classic public nuisances are keeping a house of prostitution, storing explosives in the midst of a city, making loud and disturbing noises, and blocking public thoroughfares.

This distinction means that pollution making water unusable for many downstream landowners in the use of their land is not a public nuisance because it only interferes with private rights. But pollution that interferes with the public right to fish in a river, or the public right of navigation, is a public nuisance. Thus, many harms--even widespread ones--are not public nuisances because they don't interfere with rights one has as a member of the general public. There has, however, been a resurgent and sometimes successful modern application of public nuisance

²⁹ p. 1243.

³⁰ p. 1245.

³¹ p. 1244.

³² p. 1256.

actions by state prosecutors, especially in hazardous waste cases.³³

Federal Law Encroachment on State Jurisdiction

While nothing in either H.R. 925 or S. 605 directly preempts state authority to define state nuisance law, one potentially undesirable consequence of the bills, if enacted, would be to engage Federal agencies and courts in an ongoing process of defining the boundaries and rationale of nuisance law in all 50 states. It seems inevitable that this process will bring a significant Federal influence to bear on the interpretation and content of an area of state law that has always been the special domain of the states. The Federal influence could be especially strong in influencing nuisance law, where state-law development has not been extensive in recent years, having been largely displaced by extensive regulatory statutes.

-end-

³³ Sevinsky, Public Nuisance: A Common Law Remedy Among the Statutes, 5 Natural Resources and Environment 29 (1990).

[The prepared statements of Alice Rivlin, Michael Davis, Gary S. Guzy and John R. Schmidt are located in the appendix of October 18, 1995.]

Senator THURMOND. Thank you very much.

Mr. Adler?

STATEMENT OF JONATHAN H. ADLER

Mr. ADLER. Thank you, Mr. Chairman, for the opportunity to present testimony before this Committee on this very important issue. My name is Jonathan Adler. I am director of Environmental Studies at the Competitive Enterprise Institute, a nonprofit, non-partisan public policy institute here in Washington, DC.

Mr. Chairman, Americans believe very deeply in their right to private property. While polls consistently show that Americans care about environmental protection and want to see the environment protected, those very same polls show that a majority of Americans support compensation for landowners, when their land is devalued due to environmental regulations.

Public good should be provided at public, not private, expense. This is the rule for most nonenvironmental public goods such as military bases and highways. On the other hand, public goods, like wetland preserves and wildlife refuges, are created by bureaucratic edicts that deny property owners the use of their land.

If the public wants to protect species habitat or an ancient stand of trees for some broad environmental value, it should be able to, but the public should be willing to pay for it. The costs should not be imposed on whomever is unfortunate enough to hold title to a coveted piece of land.

As the Supreme Court held in *Armstrong v. The United States*, the takings clause, "* * *" was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." I believe that 605 would go a long way in invigorating that principle, particularly in ways that the Supreme Court has not.

More importantly, arguments over the potential costs of takings compensation requirement obscure the more fundamental issue. Land use regulations inevitably entail costs. The real issue is who should bear those costs. Costs of excessive land use controls are borne by the Federal regulatory agencies themselves, as is called for under S. 605. Agencies will have a tremendous new incentive to consider the costs of their regulatory edicts, as well as more cost-effective alternatives to command and control regulation.

Nonregulatory approaches to wetlands protection, for example, can be less than one one-hundredth of the cost of Federal regulations in protecting wetlands. Enactment of S. 605 would encourage the EPA and the Army Corps of Engineers to consider such alternative approaches.

Earlier today there was mention of the recent Nobel prize winners in science. I think it is important to also remember the Nobel prize winners in economics, which is Professor James Buchanan at George Mason University, who pointed out that incentives to public agencies matter in their behavior. If the public agencies are not given incentives to consider the cost of their rules, they will not do so. This bill would force them to consider those incentives, and that

would be to the benefit of Environmental Protection and to private property owners.

Environmental argument made against takings compensation proposals like S. 605 is that paying compensation for regulatory takings will amount to paying polluters not to pollute. This represents a fundamental misunderstanding of the nature of property rights and the proper role of government in protecting them. Moreover, it misrepresents the nature of the proposal before this committee.

Compensation should be paid when the Federal Government acts so as to deprive a property owner of a right to use and enjoy that property. Property rights properly understood do not include the right to injure or harm the person or property of another. This principle is grounded in the common law.

S. 605 embodies this principle. Section 204(d)(1) explicitly spells out a nuisance exception to the payment of compensation by the Federal Government. The language in this section is clearly modeled on the language of the Supreme Court's *Lucas* decision. When the Government limits or prohibits the use of property that is likely to harm another person or property, it does not deprive the owner of a property right. However, should the Government limit the use of property for some other purpose, such as the provision of wildlife habitat or some other public good that we all benefit from equally, compensation should be paid. The difference is the nature of the Government action in question. This should determine whether or not compensation is due, not the level of the devaluation experienced by the landowner.

Regrettably, S. 605 does not require compensation if the property owner does not suffer a sufficient economic loss. From dealing with lots of grassroots groups, I know this is a real concern that they have, and 33 percent, in their view, is a compromise. I believe for those who believe in property rights, 33 percent threshold is a compromise. It is the equivalent of saying that a burglar has not committed a crime if he only takes some percentage of the money in your wallet and leaves the rest.

Finally, Mr. Chairman, it is important to recognize that regulatory takings themselves can have negative environmental impacts. Takings often discourage individuals from taking steps to improve habitat and environmental amenities due to the threat of regulation.

Senator Chafee, who was here earlier, has seen this firsthand when he visited the farm of Mr. Ben Cone in North Carolina earlier this year and saw firsthand how careful conservation practices were destroyed as a result of regulatory takings.

It is my understanding that Mr. Cone has, indeed, filed a takings claim in Federal court in the U.S. Claims Court, and I would argue and believe that Mr. Cone will be successful if he goes through with his suit. Mr. Cone is a wealthy landowner. He has the resources to pay for such a suit. Most landowners do not. This bill would expand their ability to seek justice in court.

Property rights are important for both economic and environmental reasons, Mr. Chairman. It must be protected from both government regulation and private malfeasance. Compensating landowners when they are deprived of the reasonable use of their land

will not produce environmental catastrophe. In many cases, it will actually eliminate the negative environmental incentives created by improperly conceived government regulations.

Thank you, Mr. Chairman. I would be happy to answer any questions that you might have.

[The prepared statement of Mr. Adler follows:]

PREPARED STATEMENT OF JONATHAN H. ADLER

Thank you Mr. Chairman for the opportunity to present testimony before this Committee. My name is Jonathan Adler, and I am director of environmental studies at the Competitive Enterprise Institute in Washington, D.C. CEI is a non-profit, non-partisan research and advocacy institute dedicated to the principles of free enterprise and limited government. CEI's work includes efforts to advance the public understanding of the hidden costs of government overregulation and to research and promote free market approaches to policy issues.

CEI has long been involved in the property rights debate. CEI analysts have analyzed the impact of regulatory takings on private landowners, as well as the environmental implications of different property rights regimes. In January, CEI published a *Property Rights Reader* of essays by CEI analysts and associates on property rights and related subjects. CEI also engages in direct legal action where necessary, and has represented victims of takings in court. Most recently, CEI filed an *amicus curiae* brief in the case of *Babbitt v. Sweet Home* before the U.S. Supreme Court.

In my testimony I will focus on the issue of property rights and regulatory takings with a particular focus on the implications of current legislative proposals on environmental protection.

INTRODUCTION

The growth of federal land use regulation over the past two decades has sparked a strong grass roots opposition. While polls seem to indicate broad public support for current environmental laws, those same polls show strong public sentiment in favor of compensation for regulatory takings. A May 1995 Roper Starch Poll found that two-thirds of Americans believe landowners should be compensated when wetlands regulations or endangered species protections devalue their land. Only 26 percent opposed compensation.

Much of the debate over property rights and whether the federal government should compensate the victims of regulatory takings is focused in the environmental arena. For two decades, federal land-use control has been the dominant means of achieving many environmental objectives. As a result, the federal government has denied countless landowners the reasonable use of their land in the name of environmental protection; property owners are finding their land effectively taken from them without compensation.

Two federal laws, in particular, have been the focus of the debate over compensation for regulatory takings: the Endangered Species Act (ESA) and Section 404 of the Clean Water Act (CWA), the source of regulations limiting the development of wetlands. However it would be a mistake to believe that these are the only two federal laws that unduly limit the use of private land. In New Hampshire, for example, grass roots property rights activism centered on opposition to the designation of a "wild and scenic" river. Any bill that seeks to protect the property rights of Americans must cover *all* federal laws that deprive landowners of the reasonable use of their land. There is no principled basis upon which to pick and choose which laws, environmental or otherwise, should be covered.

The primary reason that current approaches to environmental protection engender conflict and opposition is that they trample on the property rights of individual Americans, often bankrupting them in the process. Under current environmental laws individual Americans have been prevented from building homes, plowing fields, filling ditches, felling trees, clearing brush, and repairing fences, all on private land. The federal government has even barred private landowners from clearing firebreaks to protect their homes from fire hazards. In Riverside County, California, for instance, the Fish and Wildlife Service informed Cindy Domenigoni on July 1, 1992 that clearing a firebreak would constitute a "harm" to the endangered Stephens' kangaroo rat and was "not authorized." A similar notice was sent to Michael F. Rowe on June 5, 1992, which included the admonition that discing to clear a

firebreak could make him subject to "both State and Federal prosecution."¹ In the subsequent fires, 29 homes in Riverside County burned to the ground.

Interior Secretary Bruce Babbitt, at times, has been forthright in declaring the broad scope of property regulation under current environmental law. In a 1993 speech before the Society of Environmental Journalists, the Secretary sought to explain the proliferation of ESA horror stories thusly: "when a species is listed, there is a freeze across all of its habitat for two to three years while we construct a habitat conservation plan which will later free up the land."² Whether the land is eventually freed up or not, productive use of lands declared to be habitat for endangered species is halted under the ESA, whether such actions could harm the public's purported interest in wildlife or not. In this manner, the federal government effectively condemns an easement across private land to create a wildlife refuge, albeit temporarily in some instances, without paying just compensation.

This policy cannot but have significant effect on property owners around the nation. According to the General Accounting Office, over 75 percent of those species currently listed under the ESA rely upon private land for some or all of their habitat.³ In the case of wetlands, approximately three-fourths of the lands that meet the federal government's definition are on private land. Thus, as long as the federal government continues to rely upon regulation to conserve these resources, conflicts with private landowners are inevitable. Indeed, even staunch opponents of takings compensation, such as the National Wildlife Federation, have implicitly acknowledged this fact, calling for reforms that make environmental laws "more workable for private landowners."⁴ The Clinton administration has also marginally altered the application of these laws so as to blunt their impact on private parties, particularly small landowners. If current environmental laws did not impinge upon the rights of landowners, such improvements would not be necessary.

Think of what the government is doing in another manner. Under current law, it is illegal to harm a homeless person, as it should be. However, property owners are not required to cede their homes or backyards in order to provide homeless shelters. If a homeless person finds his or her way onto an individual's private property, the owner does not have to forfeit use of that property and let that homeless person remain. Should the government wish to turn an individual's property into a homeless shelter, then it would have to compensate the owner. However, should endangered wildlife settle on someone's property, then the situation is entirely different. Under the Endangered Species Act, as recently upheld by the Supreme Court in *Babbitt v. Sweet Home*, the landowner can be forced to give up use of the land to provide species habitat, and no compensation is paid. Few but the most ardent environmentalists can view this situation as just.

Under present law, public costs that should be borne by all are foisted upon those landowners unfortunate enough to own the exact parcels of land that the government covets for environmental purposes. Irrespective of whether federal courts currently hold such actions to be Constitutional without compensation, they are neither fair nor just. It is imperative that Congress restore protections for private property that the Courts have failed to consistently uphold.

PUBLIC GOODS VS. PRIVATE COSTS

If the protection of property rights entailed compensating landowners each and every time a government action conceivably impacted the value of their lands, environmental and budgetary concerns would be justified. Under such a scenario, it would certainly be possible for a corporation to demand compensation when prevented from injecting toxins into neighboring groundwater, fouling the air of a local community, or creating an imminent and identifiable threat to nearby land owners. However, this is not what protecting private property rights is about, nor is it an accurate description of S. 605.

Indeed, the current controversy over property rights is not about government pollution control efforts or federal protection of public health and safety. The many thousands of groups and individuals that make up the property rights movement are not rebelling against government attempts to protect their neighbors. They are rebelling against federal government regulations, largely environmental, that re-

¹ Copies of these letters and additional FWS correspondence are contained in Ike C. Sugg, "Rats, Lies, and the GAO," Competitive Enterprise Institute, August 1994.

² This speech was published as Bruce Babbitt, "The Triumph of the Blind Texas Salamander and Other Tales from the Endangered Species Act," *E Magazine*, March/April 1994.

³ U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands*, GAO/RCED-95-16 (December 20, 1994).

⁴ National Wildlife Federation, "The Endangered Species Act: Finding Common Ground," October 1994.

strict the reasonable use of private land, such as building homes and planting crops. Most "takings" cases arise not when public health is at risk, but when the rights of landowners are suppressed by the federal government for non-essential purposes.

Groups opposing compensation for regulatory takings typically argue that federal environmental laws do not take private land, and that requiring compensation for regulatory takings would impose an extreme financial burden upon the federal government. These two arguments are contradictory, and takings opponents cannot have it both ways. Either property rights are not being violated, and a takings compensation requirement would be a superfluous enactment, or violations are rampant, and substantial amounts would have to be paid in compensation. Only one of these arguments can be true.

The administration has implicitly acknowledged that the latter is more likely to be the case. In a June 7 letter to Senate Judiciary Committee Chairman Orrin Hatch, White House Office of Management and Budget director Alice Rivlin claimed that the bill before this committee, S. 605 would be tremendously expensive, surpassing the \$28 billion price tag placed on the House bill, H.R. 925. For the federal government to be exposed to such financial claims, federal regulations must be infringing upon the rights of landowners on an unprecedented scale. How else could it be exposed to such exorbitant liability?

Either way, arguments over the potential cost of a takings compensation requirement obscure the more fundamental issue. Land-use regulations inevitably entail costs. The real issue is who should bear those costs. As James Huffman, Dean of the Northwestern School of Law at Lewis and Clark College notes:

The pervasive notion that society can avoid the costs of public action if government can avoid compensating for property affected is simple self-deception. The costs of government action will be borne by someone. The compensation requirement, like a rule of liability, simply determines who that someone is. * * * *

Under current policy, "public goods" such as military bases and highways are created by purchasing lands from private owners. On the other hand, "public goods" like wetland preserves and wildlife refuges are created by bureaucratic edicts that deny property owners the use of their land. This is not how it should be. If the public wants to protect the habitat of an endangered species or preserve an ancient stand of trees for some aesthetic, spiritual, or broad "environmental" value, then the public should be willing to pay for it, just as it pays for other "public goods." The costs should not be imposed on whoever is unfortunate enough to hold title to a coveted piece of land.

WHAT LOSSES ARE COMPENSABLE

As the Supreme Court held in *Armstrong v. United States*, the Constitutional prohibition on uncompensated takings "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."⁶ Similarly, in the recent case of *Whimsy Benefits v. United States*, a successfully litigated takings claim against the federal government, the U.S. Claims Court reminded us that:

If the Fifth Amendment is to have any force, courts must determine when and whether government's actions destroy the rights in property that are an essential component of ordered liberty.⁷

S. 605, on the whole, embodies this philosophy and seeks to clarify Congress' opinion as to how federal courts should make these determinations.

S. 605's greatest defect with regard to compensation is its monetary threshold. Just as it should not matter under what statute a regulatory taking occurs, it should also not matter how much a landowner suffers economically as a result. The issue before a court or administrative agency should simply be whether a property right has been taken. When such a taking occurs, compensation should be paid, no matter how large or small. By the same token, when the government uses its legitimate authority to prevent a landowner from harming another, it matters not if that landowner is left destitute.

⁶ James Huffman, "Avoiding the Takings Clause through the Myth of Public Rights: The Public Trust Doctrine and Reserved Rights Doctrine at Work," *Journal of Land Use and Environmental Law*, Fall 1987, p. 173 n9.

⁷ 364 U.S. 40, 49 (1960).

⁸ *Whitney Benefits, Inc. v. U.S.* 18 Cl. Ct. 394, 399 (1989).

Regrettably, in many instances S. 605 does not require compensation if the property owner does not suffer an economic loss greater than 33 percent of the affected portion of the regulated property's value. This is unjust, for a taking is a taking. Whether a landowner is sufficiently harmed is not the issue. Whether a landowner's right to her property has been violated by the federal government is. It is that simple.

This point was made by the Supreme Court with regard to takings resulting from physical occupations in the case of *Loretto v. Teleprompter Manhattan CATC Corp.*⁸ In that case the Supreme Court ruled that even occupations that impose "minimal" hardships were compensable takings. Essentially the Court held that the extent of the imposition is immaterial to the question of whether a taking occurred. If this is the case with physical takings, it should be with regulatory takings as well. The current takings compensation proposal falls short of this standard. S. 605 certainly would offer potential relief to many property owners that would not be likely to receive compensation in court today, but due to the 33 percent threshold, it does not go far enough. S. 605 would be a fairer and more equitable proposal were it to adopt a de minimis standard or supplement the 33 percent threshold with a monetary one.

Under S. 605, the owner of a \$100,000 parcel that is devalued by "only" \$30,000 could receive nothing, no matter what hardship the devaluation causes. As Justice John Paul Stevens has noted (albeit with differing intent), making a distinction as to who is entitled to compensation based on the amount of the devaluation is "wholly arbitrary."⁹ This rule is the equivalent of saying that a burglar has not committed a crime if he "only" takes one third of the money in your wallet and leaves the rest. In S. 605, Section 203 (3)(A), "just compensation" is defined as "compensation equal to the full extent of a property owner's loss * * *" Apparently this does not include those who do not suffer enough of an economic devaluation.

However, it is to bill author(s)' credit that the 33 percent threshold applies to the affected portion of the regulated property, and not the property as a whole. This rightly expands the range of government actions that are potentially compensable. It should also be noted that the *Lucas* majority felt that it was "unclear" whether the Court should focus on a regulation's impact on a whole tract or merely the affected portion.¹⁰ S. 605 thus has the virtue of clarifying this issue for the court and potential litigants (an important point to consider for those who allege that S. 605 is too vague as to what it would require and allow).

WHEN COMPENSATION IS DUE

Many have charged that compensation proposals, such as S. 605, would require the federal government to pay compensation "whenever" federal regulatory actions diminish property values.¹¹ Were this true, it is likely that all but the most extreme libertarian ideologues would balk at supporting such a bill, for there is little that the government can do, from raising interest rates to constructing a highway, that will not impact property values in some manner. As the Supreme Court has held fairly consistently "mere diminution in the value of a property, however serious, is insufficient to demonstrate a taking."¹² It is a mark in this bill's favor that it rejects a compensation standard that is wholly dependent upon the monetary impact of federal regulatory actions.

Compensation *should* be paid when the federal government acts so as to deprive a property owner of a right to use and enjoy that property. As already noted, property rights, properly understood, do not include the right to injure or harm the person or property of another. This is the basis of the common law principle that one should not use his own property so as to injure that of another.¹³ This means that when the government limits or prohibits the use of property in a manner that is likely to harm another person or property, it has not deprived the owner of a property right. However, should the government limit the use of property for some other purpose, such as the provision of wildlife habitat or some other "public good," compensation should be paid. The difference is the nature of the government action in

⁸ 102 S. Ct. 3164 (1982).

⁹ Justice Stevens, dissenting, *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2919 (1992).

¹⁰ *Lucas*, p. 2894 n. 7.

¹¹ See, for example, "Earth to Congress" (editorial) *The New Republic*, May 8, 1995.

¹² *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2291 (1993).

¹³ The maxim is *Sic utere tuo ut alienum non laedas*, "one is so to use his own as not to injure another's property."

question. This should determine whether or not compensation is due, not the level of devaluation experienced by the landowner.

Section 204 (d)(1) of S. 605 explicitly spells out a "nuisance exception" to the payment of compensation by the federal government:

No compensation shall be required by this Act if the owner's use or proposed use of the property is a nuisance as commonly understood and defined by background principles of nuisance and property law as understood within the State in which the property is situated * * *

This language is clearly modeled on the language of the Supreme Court's majority opinion in *Lucas v. South Carolina Coastal Council*, in which the Court held:

[T]he question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they take title to property. Because it is not consistent with the historical compact embodied in the Takings Clause that title to real estate is held subject to the State's subsequent decision to eliminate all economically beneficial use, a regulation having that effect cannot be newly decreed and sustained, without compensation's being paid the owner. *However, no compensation is owed—in this setting as with all takings claims—if the State's affirmative decree simply makes explicit what already inheres in the title itself in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.* (Emphasis added)¹⁴

The primary difference between S. 605 and Supreme Court precedents is not the character of the government actions that can trigger compensation. Rather, S. 605 seeks to make explicit that less-than total takings are still worthy of compensation, provided that they amount to more than 33 percent of the affected property's value, or otherwise fail to meet the standards set forth in S. 605. Moreover, the *Lucas* majority explicitly left open the possibility that those who have suffered less than total economic deprivations could be entitled to compensation.¹⁵ Thus it is hard to argue, as the Clinton Administration and others have, that S. 605 represents a "radical departure from the Constitution"¹⁶ without similarly impugning Supreme Court jurisprudence on this subject. [It should also be stressed that S. 605 merely seeks to define a statutory right to compensation, and thus supplement, not redefine, Supreme Court jurisprudence.]

The reason for the emphasis on nuisance law is clear: There is a meaningful distinction between government exercises of the police power to protect individuals, their properties, and the public at large from a threat posed by the actions of an individual landowner, and government flats that otherwise control the use of private property. This is a distinction that has long been a part of Constitutional jurisprudence, and is one that is properly included in any proper takings compensation proposal.

IS THE NUISANCE EXCEPTION SUFFICIENT?

Much of the more substantive criticism of S. 605 has challenged whether its nuisance exception sufficiently distinguishes between those government actions for which compensation should be required and those for which it should not. Joseph Sax, Counselor to the Secretary of the Interior and Deputy Assistant Interior Secretary for Policy acknowledges that "Compensation bills contain narrow exemptions which would avoid a duty to compensate if the regulated use constitutes a nuisance," but argues that such an exception "fails to recognize that there are many important public interests that are not related to health and safety * * *"¹⁷ Sax submitted a memo to the House Resources Committee Private Property Rights Task Force Prepared by Interior Department personnel that seeks to demonstrate this case.¹⁸

To gauge the likely impact of the nuisance exception on takings compensation claims, it is useful to look at the *Lucas* court's understanding of the issue, as the language in S. 605 is based upon this decision. The court gave examples of the sorts

¹⁴ *Lucas*, p. 2888.

¹⁵ *Lucas*, 2895n8.

¹⁶ This charge has been made by, among others, Joseph Sax, Counselor to the Secretary of the Interior and Deputy Assistant Secretary for Policy. See Sax, Statement before the Private Property Rights Task Force, House Resources Committee, May 17, 1995.

¹⁷ Sax.

¹⁸ Memo on the Nuisance Exceptions in H.R. 925 and S. 605, United States Department of the Interior, May 1, 1995.

of regulations it would uphold, without requiring compensation, under the nuisance exception:

On this analysis, the owner of a lake bed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits aside an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles.¹⁹

A cursory historical review of recent cases also provides numerous examples of the sorts of activities, such as water pollution caused by a paper mill, landfill seepage that contaminated groundwater, and even air pollution, that have been declared common law nuisances in court.²⁰ Thus, it seems reasonable to conclude that the nuisance exception is likely to achieve its intended purpose: to prevent compensation in those cases where the regulated or prohibited activity is likely to cause harm to other individuals or their properties, and to allow for compensation in those other instances in which the federal government has regulated proposed land-uses. It may not be perfect, but perfection is not the standard for federal legislation. If it were, the entire U.S. Code would fit in a letter-size envelope.

Critics charge that the nuisance exception will be insufficient because courts often rule against plaintiffs that claim to have suffered nuisances inflicted by their neighbors. In those cases where courts have looked unfavorably upon plausible nuisance claims it is often for one of two reasons: (a) failure to demonstrate harm or sufficient likelihood of harm, or (b) federal law has preempted nuisance actions. These are hardly reasons to reject the appropriateness of a nuisance standard to determine whether compensation is due for regulatory takings. If a plaintiff would not be able to demonstrate a sufficient likelihood of harm, what then is the purpose of the regulation other than to control land-use or economic activity? The fact is that courts have upheld common law claims against a wide range of nuisances, and there is every reason to believe that they will continue to do so.

In the case of statutory preemption, it is unreasonable to oppose compensating individuals who have been adversely affected by federal regulation merely because the federal government has, in other instances, preempted traditional common law causes of actions against nuisances. There are certainly cases where federal law has preempted common law claims, in some cases to the detriment of property owners and true environmental protection. For instance, the Federal Aviation Administration has certainly preempted nuisance claims by landowners near airports that object to excessive noise. The proper policy response in these instances is to restore the common law causes of action, by removing or modifying the preempting regulation or statute, not to oppose other efforts to allow individual property owners to seek justice administratively or in federal courts.

When those arguing against S. 605 are not claiming the nuisance exception is too narrow, they are claiming it is too broad and vague. The Interior Department memo makes both claims, in the latter instance protesting that the bill poses "the vague and open-ended question: What is the scope of the phrase 'a nuisance as commonly understood and defined by background principles of nuisance and property law?'" The memo argues that S. 605 provides insufficient guidance in determining what sorts of activities qualify as nuisances. Yet since S. 605 merely incorporates the *Lucas* language on nuisance, this is as much a criticism of the Supreme Court as it is of S. 605. Here as elsewhere, opponents of S. 605 cannot have it both ways; they cannot appeal to the jurisprudential tradition that produced *Lucas* while simultaneously disparaging *Lucas*' nuisance exception as "vague and open-ended."

Were the administration truly concerned about the "vague and open-ended" nature of *Lucas*' nuisance exception, one would expect to see some sort of proposal to reduce uncertainty and establish a true "bright-line test" for takings cases. As the administration has not forwarded any such proposal, and has instead opposed every property rights protection proposal that has been introduced in the past two years, it is hard to take the claim seriously. Indeed, it seems that opponents of takings compensation are not opposing S. 605's handling of the nuisance issue so much as they are objecting to the idea that the federal government could ever be required

¹⁹ *Lucas*, 2900.

²⁰ Several of these cases are summarized in Roger E. Meiners, "Elements of Property Rights: The Common Law Alternative," in *Land Rights*, B.Yandle, ed. (Lanham, MD: Rowman and Littlefield, 1995).

to compensate landowners for anything other than a physical taking or regulatory action that leaves a landowner destitute.²¹

MODIFYING AGENCY BEHAVIOR

Requiring the federal government to pay compensation when reasonable land uses are restricted or prohibited can also encourage a more proper calculation of the costs and benefits of proposed regulatory actions. If political entities are able to effectively take property through regulatory activities without paying compensation, there is no incentive to consider the costs of the proposed regulation and such costs are likely to be ignored. There is thus no incentive to prioritize, and every incentive to take as much as possible. This was explained by the New York State Court of Appeals in *Fred F. French Investing Co. v. City of New York*:

[T]he ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding. * * * When [the social cost is] successfully concealed, the public is not likely to have any objection to the 'cost-free' benefit.²²

An example of this can be seen in the case of wetlands regulations, the primary means by which the federal government seeks to prevent the net loss of wetlands. The cost of protecting a single acre of wetlands can reach the hundreds of thousands of dollars due to the costly delays and legal conflicts that the regulatory process produces. However, other approaches to wetlands conservation, such as mitigation, restoration, and the purchase of conservation easements can preserve wetlands at a fraction of the cost. Forcing agencies to pay for the private property rights that they take through regulatory action will encourage them to examine non-regulatory approaches to achieving their statutory goals.

S. 605 achieves this purpose by providing that compensation for regulatory takings be taken from the annual appropriation of the agency responsible for the regulatory taking. Such a provision is likely to achieve the desired result of modifying agency behavior and restoring regulatory accountability.

Agencies seeking to regulate private land use will be forced to consider whether regulatory actions would produce a regulatory taking, and, if so, whether the benefits of the proposed regulatory action are worth the costs of paying compensation. This will induce agencies to prioritize and forego regulating nonharmful land uses when regulation is not truly necessary. This is because irresponsible regulation of reasonable land uses could deprive agencies of resources necessary to achieve their statutory missions. Agencies will no longer view land-use regulation as a cost-free solution of first resort. Rather, land-use regulation will only be pursued when the benefits appear to justify the costs or when other options are impractical or more costly.

Arguing against takings compensation proposals, Joseph Sax asserts that S. 605

would force a choice between two equally unacceptable alternatives. Because compensation would be paid directly out of agency budgets, agencies would be required to either redirect funds from priorities established by the legislative process or refrain from executing mandated programs altogether. Either way, * * * the public suffers.²³

This argument presumes that the public interest is served whenever government regulates private land-use. Speaking as one who focuses on federal environmental regulation, this is simply not the case.²⁴ Much federal environmental regulation does nothing to protect public health. Some environmental regulation actually causes environmental harm. When fires swept through Riverside County, it was not only people that lost their homes—the endangered Stephens' Kangaroo Rats did as well as their habitat went up in flames. The sad fact is that existing administrative requirements are insufficient to ensure that agencies consider the likely impacts of their options. Therefore many rules are enacted that produce minimal benefits while imposing extraordinary costs. Only those with an unquestioning faith in the wisdom of regulatory bureaucracies would wish to leave this situation as it is.

²¹ In fact, this charge could certainly be made against Joseph Sax, who has led Interior Department opposition to takings compensation proposals. See Sax, "Takings, Private Property and Public Rights," 81 *Yale Law Journal* 149 (1971).

²² 39 N.Y.2d 587, 596-7, 385 N.Y.S.2d 5, 11(1976).

²³ Sax.

²⁴ See, for example, Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (Cambridge: Harvard University Press, 1993); and, *Environmental Politics: Public Costs, Private Rewards*, M. Greve and F. Smith, ed. (New York: Praeger, 1992).

Under current law, so long as the government can provide for public goods through the imposition of regulatory takings, it will continue to do so, with little regard for the impact such actions have on landowners. Indeed, given the fact that government does not pay for the costs of regulatory takings, it should be no surprise that the government typically opts for coercive land-use regulations to achieve environmental goals, even when other approaches are available, are far less costly and would more effectively safeguard the environment.

PROPERTY RIGHTS VS. THE ENVIRONMENT

As alluded to above, a standard charge against paying compensation for regulatory takings is that it would amount to "paying polluters not to pollute" and therefore would undermine the protection of public health and safety. This represents a fundamental misunderstanding of the nature of property rights and the proper role of government in protecting them.

The proper aim of federal government efforts to protect "the environment" is to prevent the imposition of harmful substances upon unconsenting persons and their properties; and, failing that, punishing those who transgress against others in this manner. This is the aim of controlling pollution—controlling the unwanted imposition of wastes or toxins by one party on another. Pollution, properly defined, is a "trespass" or "nuisance" under the principles of common law. If the imposition is so minor that it creates no impact or inconvenience for the property owner, it will normally be tolerated. Otherwise it will likely result in legal action of some kind.

Many of the pollution problems with which people are familiar are not the result of too many private property rights, but too few. These problems are often the result of what is essentially a universal "easement" granted by the state to polluters, even to producers of significant and damaging pollution.²⁵ This action by the state is of the same kind as regulatory takings—in each case the government is violating the rights of property owners in order to pursue some conception of the "public good." In the case of easements that permit "acceptable" levels of pollution the "public good" is efficiency or some other utilitarian measure. In the case of most current federal land use restrictions, the "public good" is the preservation of an environmental amenity or value that "the public" has deemed worthwhile. The federal government certainly has the power to pursue these objectives, however it is imperative that its power be restrained by requiring the payment of compensation to those landowners who are injured in the process.

TAKINGS VS. THE ENVIRONMENT

It must also be recognized that efforts to regulate land use—to "take" private land without compensation—is often bad for both landowners and the environmental values that the government regulation is designed to protect. If the specter of environmental regulation hangs over private land use decisions, private landowners will be less likely to invest in environmental improvements on their lands. Such stewardship actions will entail costs to the landowner with no reasonable expectation of future benefits. One can understand this phenomenon if one thinks of the likely result were the government to declare a policy of "protecting" pretty houses by imposing a series of regulatory restrictions upon families living in any homes that met the federal definition of "pretty." Under such a regime, no rational homeowner would beautify his or her home, lest it fall prey to government regulation that could restrict their freedom within their home. Rather than preserve the stock of pretty houses in America today, such a policy would likely prevent the construction or restoration of pretty homes ever again.

Even the Fish and Wildlife Service has acknowledged that the threat of federal regulation on private land has led to habitat loss. In the Pacific northwest, habitat destruction has been encouraged by land-use restrictions imposed to protect the northern spotted owl. Earlier this year the FWS reported in the *Federal Register* that these regulations have made private landowners fear the lost use of their land and that "this concern or fear has accelerated harvest rotations in an effort to avoid the regrowth of habitat that is usable by owls."²⁶

That landowners would respond in this manner to the imposition of federal land-use controls should not be surprising. Michael Bean characterizes them as "fairly rational decisions motivated by a desire to avoid potentially significant economic

²⁵ Indeed, it is important to recognize that many federal statutes have effectively preempted traditional common law remedies to pollution problems. See *Illinois v. Milwaukee*, 406 U.S. 91 (1972) and *Milwaukee v. Illinois*, 451 U.S. 304 (1981).

²⁶ 60 *Federal Register* 9507-8 (February 17, 1995).

constraints.”²⁷ Sam Hamilton, former Fish and Wildlife Service administrator for the state of Texas explains this more fully: “The incentives are wrong here. If I have a rare metal on my property, its value goes up. But if a rare bird occupies the land, its value disappears.”²⁸

What Sam Hamilton describes is the inevitable result of using federal land-use controls as a means of pursuing environmental protection; land-use restrictions produce land devaluations for those who are restricted. Insofar as private landowners are threatened with the potential loss of the productive use of their land without compensation by environmental statutes, they will have an incentive not to provide whatever environmental amenity that the federal government is seeking to protect. Whether this committee or the federal courts wish to recognize such land-use controls as uncompensated regulatory takings or not, this will remain the case.

CONCLUSION

It is time to recognize that property rights are important for both economic and environmental reasons, and must be protected from both government regulation and private malfeasance. Compensating landowners when they are deprived of the reasonable use of their land will not produce environmental catastrophe. Far from it. As I, and others, have argued elsewhere, in many cases it will eliminate the negative environmental incentives created by the heavy hand of existing government regulations. Properly understood, property rights do not undermine sound environmental conservation, they lie at its foundation.

Compensation to landowners is a simple matter of justice; private parties should not bear public costs. S. 605 is not a perfect bill—it falls short of ensuring that all victims of regulatory takings will receive justice—but it would represent a decisive step toward ensuring justice for landowners in this country. I urge this committee and the rest of the Senate to take this step by enacting a statutory requirement for compensation for regulatory takings.

Senator THURMOND. Thank you very much. We are glad to have you with us. Mr. Wilkins?

STATEMENT OF RICHARD G. WILKINS

Mr. WILKINS. Thank you, Mr. Chairman. My name is Richard G. Wilkins, and I am a professor of law at the J. Reuben Clark Law School, Brigham Young University.

The need to provide effective statutory protection for regulatory abuse of private property rights is plain. Although the Supreme Court has attempted to enunciate and apply workable limits on governmental power under the takings clause, that effort has proven exceptionally difficult.

This difficulty has stemmed, however, not from the inability to state governing principles, but from the inability to apply those pragmatically to given cases. This bill aids in that effort.

I am somewhat surprised to hear this bill described as a radical departure from established Supreme Court precedent because, in very large measure, what this bill does is codify and clarify existing constitutional doctrine. It does so, and in my written testimony I go through and show how most of the provisions of the bill are simple and unremarkable restatements of the holdings of the leading Supreme Court cases in this area. The one area where the court does go beyond those cases is the one area where, rather than having widespread unanimity on the court, there has been widespread confusion and, in fact, inability to apply constitutional doctrine. That provision is the one that is set forth in section (a)(2)(d) of this

²⁷ Speech by Michael Bean to the U.S. Fish and Wildlife Service Seminar, “Ecosystem Approaches to Fish and Wildlife Conservation: Rediscovering the land Ethic,” November 3, 1994 (from video; transcript available from CEI).

²⁸ Quoted in Betsy Carpenter, “The Best-Laid Plans,” *U.S. News & World Report*, October 4, 1993, p. 89.

bill, which simply puts remedial teeth in an old constitutional principle that harks back to 1922, when Justice Holmes said, "Government regulation cannot go too far without violating a takings clause."

The Supreme Court, despite its success in enunciating general principles, simply has been unable to give this important principle any real content. The Supreme Court explained in 1922 that the Government can't go too far. In 1960 it said it can't force people, "* * * to bear public burdens which in all justice and fairness should be borne as the people as a whole." But how you effectuate those very, vague tasks is hardly self-evident, and the Supreme Court has been unable to give any real guidance except for what guidance this bill codifies.

The Supreme Court, in addressing when government regulation goes too far, has suggested that government never goes too far unless it takes all value or physically invades property. Now many have argued, and I know that some have argued before this Committee, that this result is desirable because it gives government regulators needed flexibility. But the Supreme Court's inability to separate the near from the far has resulted in so much flexibility, that the regulatory limits of the fifth amendment have effectively disappeared. I am not the only scholar who has suggested that the Supreme Court's inability to put any content into Justice Holmes' dictum has, to a large extent, rendered the fifth amendment, essentially, meaningless.

The extreme flexibility of current doctrine is simply not advisable. Chief Justice Rehnquist noted, "Many of the provisions of the Constitution are designed to limit flexibility and freedom of government authorities, and the just compensation of the fifth amendment is one of them."

Now Senate bill 605 will ensure that the fifth amendment performs its important limiting rule by providing a simple remedial rule. Government goes too far when it takes as much as one-third of the value of property, thereby, finally putting teeth into Justice Holmes' 1922 dictum.

Now this bright-line approach has much to commend it. First, it is understandable. Second, I believe that it effectuates a rough and fair balance between public need and individual right. Any government regulation, of course, will adversely affect property rights. Justice Holmes, himself, recognized that in *Mahon*, when he said government could hardly go on if you have to compensate for everything. But the Supreme Court has been unable to provide any intelligible guidance because balancing the near from the far necessarily requires a court to determine whether public need outweighs, in any given case, intrusion upon private interests. That determination, I submit, is essentially and quintessentially a political decision.

Courts are ill-equipped to determine when government has gone too far because, in the context of a discrete case, they are only given one option; invalidate the action or say this particular private property owner has to bear the entire cost of the regulatory scheme.

I think that the Supreme Court is not the only protector of constitutional rights in this country. Congress, as it has done with leg-

isolation under the commerce clause and 14th and 15th amendments, has the ability and, indeed, the obligation to protect the constitutional principles inherent in the takings clause.

I think that this legislation does an admirable job of doing that, and I would urge its passage.

[The prepared statement of Mr. Wilkins follows:]

PREPARED STATEMENT OF RICHARD G. WILKINS

I am pleased to have the opportunity to testify in support of Senate Bill No. 605. The Bill addresses—and provides redress for—one of the most troubled areas of the Supreme Court's Takings Clause jurisprudence: that is, when does government regulation go "too far"? The bill also addresses—and alleviates—an unfortunate jurisdictional tangle that has developed between United States District Courts and the Court of Claims. For both of these reasons, I hope that the Bill will be passed and signed into law.

WHEN DOES GOVERNMENT REGULATION GO "TOO FAR"?

The need to provide effective statutory protection for regulatory abuse of private property rights is plain. Although the Supreme Court has attempted to enunciate and apply workable limits on governmental power under the Fifth Amendment's Taking Clause, that effort has proven exceptionally difficult. The difficulty, moreover, has stemmed—not from the Court's inability to discern governing principles—but from its inability to apply those pragmatic principles to discrete cases. Section 204(a)(2)(D) of Senate Bill 605 effectively addresses this remedial "gap."

Section 204 of Senate Bill 605, in large measure, codifies and clarifies current constitutional doctrine. It does so by explicitly adopting already-established constitutional standards and expressly acknowledging that these standards may yet evolve. Subsection (a)(1), for example, simply restates the rule in *Loretto v. Teleprompter*, 458 U.S. 419 (1982).¹ Subsection (a)(2)(A), in turn, codifies the rule in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987),² subsection (a)(2)(B) adopts the standard enunciated in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994),³ subsection (a)(2)(C) sets out the test established by *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992),⁴ and subsection (a)(2)(E) recognizes that there may be addi-

¹ Section 204(a)(1) provides, in pertinent part:

A property owner shall receive just compensation if * * * as a consequence of an action of any agency, or State agency, private property (whether all or in part) has been physically invaded * * *

Compare *Loretto*, 458 U.S. at 434 ("In short, when the 'character of the governmental action' * * * is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner") (citations omitted).

² Section 204(a)(2)(A) provides, in pertinent part:

A property owner shall receive just compensation if * * * [government] action does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based * * *

Compare *Nollan*, 483 U.S. at 834 ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'") (citations omitted).

³ Section 204(a)(2)(B) provides, in pertinent part:

A property owner shall receive just compensation if * * * [government] action exacts the owner's constitutional or otherwise lawful right to use the property or a portion of such property as a condition for the granting of a permit, license, variance, or any other agency action without a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property. * * *

Compare *Dolan*, 114 S. Ct. at 2319-2320 ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development") (citations omitted).

⁴ Section 204(a)(2)(C) provides, in pertinent part:

tional circumstances where "a taking has occurred within the meaning of the fifth amendment of the United States Constitution." These provisions, therefore, are unremarkable—unless, of course, one either disagrees with established Fifth Amendment jurisprudence or believes that the Supreme Court has already specified all possible applications of the Takings Clause.

The provision that I find most noteworthy in Senate Bill No. 605 is Subsection (a)(2)(D) which, as I read it, puts remedial teeth in a constitutional principle that harks back to Justice Holmes' opinion in *Mahon v. Pennsylvania Coal*, 260 U.S. 412 (1922). That principle is this: while government has the power to regulate despite incidental impacts on property value, government regulation may not go "too far" without violating the Takings Clause. The Supreme Court, despite its success in enunciating the general constitutional standards codified by this legislation, has been remarkably unsuccessful in giving any real content to this famous phrase.

A hypothetical illustration highlights both the tensions inherent in Justice Holmes' dictum and the difficulties that have plagued the Supreme Court's efforts to enforce it. Suppose that a developer purchases a piece of property near an urban area that, for many years, has been zoned for high-density commercial development. The property, if used for construction of a high-rise office building, has a value in excess of \$10 million. However, once development begins, nearby homeowners—who fear that a high-rise office building will block a panoramic view of a distant mountain range—prevail upon city councilmen to enact a "mountain view" ordinance that extinguishes the previously existing zoning rights. As a result, property that once was worth \$10 million comes to have little (or no) commercial value.

Some version of this hypothetical scenario is played out again and again in modern society. On the one hand is the property owner who legitimately believed that it had the right to develop and use a classic property interest in a profitable manner. On the other hand is the equally legitimate need of the public to preserve important public interests. How are these conflicting interests to be mediated?

The governing constitutional doctrine is relatively clear: government, in the course of protecting even such important interests as scenic resources, may not go "too far." Or, as the Supreme Court somewhat more cogently explained in 1960, government may not force some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The result dictated by either of these formulations, however, is hardly self-evident. Granted that the government may not go "too far" in intruding upon the right of a property owner in the course of furthering even important governmental interests, what distinguishes the "far" from the "near"? Granted that government may not force some property owners to bear a disproportionate burden of the cost of protecting limited natural resources, when is *that* line crossed?

Supreme Court cases addressing the issue give little concrete guidance. Indeed, the Court has managed to protect property owners in only a few rather discrete categories of cases. These categories include those situations where government regulation results in a physical intrusion, prohibits all economically productive use of property, does not substantially further a legitimate governmental interest, or inappropriately exacts a property interest as a condition for a government permit. As noted above, Senate Bill No. 605, in subsections 204(a)(1), (a)(2)(A), (B), and (C), codifies these jurisprudential rules. Notes 1–4, above. Beyond these relatively clear lines, however, lies a vast area of uncertainty. It is in this area that Senate Bill 605 provides welcome clarity.

The Supreme Court has been unable to identify precisely *when* government action goes "too far."⁵ Indeed, the Court's decisions can be read as suggesting that the gov-

A property owner shall receive just compensation if * * * [government] action results in the property owner being deprived, either temporarily or permanently, of all or substantially all economically beneficial or productive use of the property or that part of the property affected by the action without a showing that such deprivation inheres in the title itself. * * *

Compare Lucas, 112 S. Ct. at 2899 ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with") (citations omitted).

⁵In fact, one could even argue that the Court has been unable to apply the relatively "clear" rules attributable to physical invasions and total loss of value. The clarity of the "physical invasion" and "deprivation of all value" lines is often more apparent than real. For example, determining when a "physical" invasion has occurred has proven difficult. In the development hypothetical noted above, for example, the property owner may plausibly claim that—in the course of protecting a mountain view—the government has imposed an easement limiting development on the affected property. If so, has there been a physical invasion requiring compensation? *Cf. Loretto v. Teleprompter*, 458 U.S. 419 (1982) (attaching cable television lines to the outside of an apartment building results in a "physical invasion" requiring compensation). The property

ernment never goes "too far" unless it physically appropriates a property interest.⁶ Some have argued that this outcome is desirable, because (among other things) it gives government regulators needed "flexibility."⁷ The Supreme Court's inability to effectively delineate the "far" from the "near," however, has resulted in so much "flexibility" that the limits imposed by the Takings Clause upon government regulators have effectively disappeared.⁸ I am not the only scholar who has suggested that the Supreme Court's inability to implement Justice Holmes' dictum has, to a large extent, rendered the protection afforded by the Fifth Amendment essentially meaningless. As another commentator has noted, the current construction of the Just Compensation Clause provides government "with such flexibility that [it can] substantially regulate or even take property with great freedom."⁹

The extreme flexibility of current doctrine is not advisable. As Chief Justice Rehnquist has noted, "many of the provisions of the Constitution are designed to limit the flexibility and freedom of the governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." *First Evangelical Lutheran Church*, 482 U.S. 304, 321 (1987). Senate Bill 605 assures that the Just Compensation Clause will perform this vital function by providing a clear remedial rule: government goes "too far" when it "diminishes the fair market value of the affected portion of the property * * * by 33 percent or more with respect to the value immediately prior to the governmental action." Section 204(a)(2)(D). The legislation, in sum, finally puts teeth into Justice Holmes' 1922 dictum.

Senate Bill No. 605's bright-line approach to resolving when government action goes "too far" has much to commend it. It is straightforward and understandable. Several of the Supreme Court's discussions of when government goes "too far" have become bogged down in essentially philosophical debates regarding the meaning and nature of property. Is property a "bundle of rights"? If so, what is the most important "stick" in that bundle—the right to exclude others? Or is the most important stick, perhaps, the right to develop property rights to their full economic potential? Divisions between the Justices on such issues, as evidenced by the various opinions in *Keystone Coal v. DeBenedictis*, 480 U.S. 470 (1987), and *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), give legal theoreticians and philosophers grist for learned discourse, but provide little practical help for either property owners or government regulators. This philosophical debate regarding the inherent nature of property rights, moreover, shows little sign of being resolved by the Supreme Court.¹⁰ The legislation, therefore, settles an important remedial issue by declaring that property rights are essentially economic rights.

owner, furthermore, may well argue that, because regulation has effectively destroyed the commercial value of the property, it has lost "all economic value." Cf. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (regulations prohibiting residential development within coastal flood plain deprives owner of "all economic value" and require compensation). If so, the government will predictably reply that the owner has not lost "all value:" after, all, the property owner may still visit the affected property for family picnics and other outings. See e.g., *Lucas*, 112 S. Ct. 2886, 2908 (1992) (Blackmun, J., dissenting) (flood plain regulations did not deprive owner of "all economic value" because the property owner "can picnic, swim, camp in a tent, or live on the property in a movable trailer"). The Court has hardly been consistent in addressing (and resolving) such arguments. Compare *Lucas* (elimination of development rights requires compensation) with *Andrus v. Allard*, 444 U.S. 51 (1979) (owner of archeological artifacts did not suffer a compensable taking when government regulation prohibited all sales of the artifacts; owner could still possess, view and devise the relics).

⁶ See generally Richard G. Wilkins, "The Takings Clause: A Modern Plot for an Old Constitutional Tale," 64 *Notre Dame L. Rev.* 1, 3 (1989) (citations and footnotes omitted):

[T]he [Supreme] Court has found a taking only in cases involving either physical dispossession or, less frequently, total destruction of some right closely related to physical dominion over property. Such cases, however, "are relatively rare." Accordingly, the vast majority of governmental actions adversely affecting property owners escape with little or no constitutional scrutiny.

⁷ E.g., Statement of John R. Schmidt, Associate Attorney General, Before the Subcommittee on the Constitution, Committee on the Judiciary, United States House of Representatives, Concerning Takings and Related Legislation (February 10, 1995) at 3 ("the genius of the Constitution's Just Compensation clause is its flexibility").

⁸ Richard G. Wilkins, note 6, *supra*.

⁹ John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 *Emory L.J.* 967, 1021 n.223 (1993) (summarizing Harry N. Scheiber, *Property Law Exportation and Resource Allocation by Government 1789-1910*, in *American Law and the Constitutional Order: Historical Perspectives* 132-41 (1978) (discussing state law cases which parallel the federal decisions)).

¹⁰ Compare the majority and dissenting opinions in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (where the majority concludes that property rights are primarily economic, while the dissenters stress less tangible aspects of property ownership). See also *Andrus v. Allard*, 444 U.S. 51 (1979) (Court concludes that federal regulation that effectively destroyed

Continued

The line drawn by Senate Bill 605 not only resolves the philosophical debate just noted, it effectuates a rough (and I believe) fair balance between public need and individual right. Any government regulation, of course, will have an impact upon property values. Justice Holmes recognized that fact in *Mahon* when he noted that "government could hardly go on" if it had to compensate owners for every adverse effect of regulatory actions upon property rights. 260 U.S. at 413. But the Court has been unable to provide any coherent stopping point for the pragmatic need noted by Justice Holmes. Congress should draw that line.

The Supreme Court has been unable to provide intelligible guidance as to when government regulation goes "too far" precisely because this inquiry is a quintessentially political calculation. Separation of the "far" from the "near" necessarily requires the decisionmaker to balance public need against private imposition. The determination, in short, boils down to such particularized inquiries as whether the need to preserve a mountain view justifies imposing a \$10 million cost upon a discrete property owner. Courts—including the Supreme Court—are not only ill-equipped to make such a calculation, they understandably lean in favor of the government. Any judgment that the Takings Clause has been violated requires the Court to reject the calculation of public need versus private imposition already established by another branch of government. The decided cases, which suggest that government regulators never go "too far" unless they physically invade property or take all economic value,¹¹ demonstrate that the Court is exceptionally deferential to the government's regulatory calculation. The protection afforded by the Takings Clause should be more substantial.

Senate Bill 605 appropriately provides that needed additional protection. The legislation balances public need against private imposition and declares that, while government may take as much as 33 percent of the value of a given property interest, further regulation goes "too far" unless it is accompanied by compensation. This determination is precisely the kind of judgment that Congress *should* make. The Supreme Court is not the only guardian of this Nation's constitutional rights. Congress, as it has done with legislation implementing the Commerce Clause and the 14th and 15th Amendments, has the ability—and I would assert, the obligation—to protect the constitutional values implicit in the Fifth Amendment's Just Compensation Clause.¹² Senate Bill 605, at long last, provides a point beyond which "public burdens * * *, in all fairness and justice, [will] be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

II. WHICH COURT HAS JURISDICTION UNDER THE TAKINGS CLAUSE?

In addition to resolving the remedial problem just noted, Senate Bill 605 also eliminates a troublesome jurisdictional tangle that has developed between United States District Courts and the Court of Claims.

At the present time, a litigant who seeks to enjoin government regulatory action in Federal District Court on the ground that it violates the Takings Clause will likely be met with the argument that, since the Takings Clause does not prohibit government action but only requires just compensation, the District Court lacks jurisdiction because the proper forum is the Court of Claims. Litigants who are prescient enough proceed directly to the Court of Claims, however, will be met with the government argument that a damages claim is premature because injunctive relief (not available in the Court of Claims) was not sought in Federal District Court. Current law, in short, permits the government to argue the jurisdictional equivalent of "heads I win, tails you lose."

Section 205 of Senate Bill 605 resolves this problem by providing that both the Federal District Courts and the Court of Claims shall have concurrent jurisdiction over monetary claims brought under the legislation, and by providing both courts with injunctive power to invalidate government action which violates the legislation.

This provision is helpful and most needed. Whatever ones' views regarding the proper definition of property rights, or the extent to which government should be permitted to adversely impact property rights without paying compensation, it is

all economic value of certain archeological objects did not constitute a taking because, even though objects had no commercial value as a result of the regulation, the owner retained the right to possess them).

¹¹ Richard G. Wilkins, note 6, *supra*.

¹² *E.g., Katzenbach v. McClung*, 379 U.S. 294, 202-204 (1964) ("Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally" and the Court will defer to that determination). See also the Freedom of Religion Restoration Act, Pub. L. 103-141 (adopting a stricter legislative standard for the protection of religious liberties than the standard currently imposed by the Supreme Court).

simply not appropriate to permit the government to whipsaw litigants by claiming—wherever the suit is filed—that it was filed in the wrong court.

Senator THURMOND. Thank you very much. Glad to have you with us.

Now we will go to the questioning. For round one, I think we will just allow 10 minutes to each of the Senators to propound questions. We will start at this time.

Mr. Sax, I want to thank you for taking your time to share your expertise with the Judiciary Committee on this very important issue of the protection of private property.

I would like for you to clarify certain points in your submitted testimony that appears to be contradictory. You appear to argue that this bill's nuisance exception is very narrow and state that it does not afford the necessary leeway for the Government to regulate the environment. Yet, you apparently, also, believe that the nuisance exemption is too broad and vague to be effective. Now which one is it, too broad or too narrow?

Mr. SAX. Ironically, Senator, both things are true, and they make the nuisance provision doubly difficult. In some States, nuisance law is very narrowly and technically construed so that clear cases of pollution would not constitute a nuisance and the public treasury would have to pay people to stop polluting.

At the same time, the interpretation of nuisance law is, in some places, and particularly public nuisance law, open-ended and vague so that the expectation that there would be a clear bright-line, cheap and effective way for people to get compensated is not accurate. It would open the way to costly and protracted litigation. So we think it is a two-fisted difficulty.

Senator THURMOND. Your problem with the nuisance exception appears, to me, not to be with the bill, but with the Supreme Court's 1992 *Lucas* decision. S. 605 merely codifies the Supreme Court's understanding of nuisance expanded in *Lucas*. Do you believe that *Lucas* was decided incorrectly? This was your position in your 1993 Stanford Law Review article. Is your position also the position of Secretary Babbitt and the Administration?

Mr. SAX. This bill does not codify the *Lucas* case. The *Lucas* case deals only with a categorical situation of total loss of value and, in that circumstance, Justice Scalia said, even when there is a total loss of value for which people ordinarily would be compensated, even there, if there is a nuisance, they should not be compensated. But neither Justice Scalia in the *Lucas* case nor the Supreme Court in any other case has ever said that the only basis to avoid compensation is the presence of a nuisance and, in fact, the court has expressly denied that. So I want to underline this is not a codification of the *Lucas* case.

Senator THURMOND. Do you believe that *Lucas* was decided incorrectly?

Mr. SAX. Yes; I, personally, think it was decided incorrectly, but I am not testifying on my own behalf and neither Secretary Babbitt nor the Department nor the Administration embraces or is responsible for views that I have expressed in law review articles.

Senator THURMOND. Let me ask you, again. Is your position a position of Secretary Babbitt and the Administration?

Mr. SAX. No, sir.

Senator THURMOND. No, sir. The answer is, no?

Senator BIDEN. As it relates to *Lucas* or as it relates to——

Mr. SAX. As it relates to *Lucas*, as it relates to *Lucas* only, yes, sir.

Senator THURMOND. Mr. Sax, would you comment on your views expressed in a 1971 Yale Law Journal article that the very concept of private property is so weak that one could not determine whether compensation should be awarded when the neighbor destroys private land doing target practice.

Mr. SAX. I am afraid you have me at a disadvantage, Senator. You have probably read my article much more recently than I have. I don't remember the particular example that you are referring to.

Senator THURMOND. I wonder if that is the position of Secretary Babbitt and the Administration. [Laughter.]

Mr. SAX. As I said before, neither Secretary Babbitt nor the Administration is responsible for views that I have expressed in law review articles and certainly not for statements that I have forgotten. [Laughter.]

Senator THURMOND. Mr. Adler, an argument made by certain opponents of S. 605 concerning the bill's compensation requirements is that property rights and the protection of the environment are mutually exclusive. What is your opinion of this view and can you give examples where incompleting takings create a disincentive for property owners to protect the environment?

Mr. ADLER. Certainly, Mr. Chairman. I think that environmental protections, if you look at what they are really intended to do, they are to protect people and their properties from harms that can be caused by others, whether it is pollution from a company, whether it is a noxious use of land or so forth.

The earliest efforts at environmental law were aimed at reinforcing nuisance laws, not at supplanting them and replacing them with broad regulatory edicts. I believe that S. 605 is responding to the broad regulatory edicts the Federal Government is using today to seek to pursue environmental protection, often with mixed results, and not at the essential protections of the environment, which are often, in many cases, essential property protections.

In terms of the latter part of your question, the case of Mr. Cone, which I mentioned, is very illustrative. Mr. Cone owns a lot of timberland that he selectively cut in North Carolina and managed so as to attract wildlife. He was very successful at attracting wildlife. In fact, he was so successful he attracted Red-Cockaded Woodpeckers, which were listed under the Endangered Species Act. The Fish and Wildlife Service then informed Mr. Cone that he could not continue with his selective cutting with the management of his land the way he had been managing it because the selective cutting that clearly hadn't prevented the Red-Cockaded Woodpeckers from coming to his land, the Fish and Wildlife Service claimed might somehow harm the woodpeckers now that they were there.

This imposed tremendous cost on Mr. Cone. It caused a tremendous devaluation of his land. What he did in response, and this was a rational response on his part and Michael Bean of the Environmental Defense Fund and others have explained in detail why his response was a rational response, was to go and clear much of

the rest of his land that had not yet been declared habitat to protect himself from the Federal Government subsequently coming along and saying that, "Well, Red-Cockaded Woodpeckers are in the rest of your habitat as well."

Mr. Cone was an archetypal steward. He was conserving his land at his own expense. He was providing tremendous public benefits. Regulatory takings prevented him from doing that and created tremendous negative incentives against him doing that. That is why Mr. Cone has filed a claim in the U.S. Claims Court of a taking. It is also why he is particularly upset with the way the Endangered Species Act penalizes people for providing habitat.

If I could just give a, well, actually I think the example of the van Gogh painting that was discussed earlier demonstrates quite clearly the types of incentives that landowners face.

Senator THURMOND. Some critics of S. 605 complain that the bill would require compensation for any diminution of value caused by Federal regulation. Now this is simply false. Case law makes clear that preexisting governmental restrictions are not takings, as it relates to a new property owner. How does this doctrine of preexisting restrictions on property apply to the wetlands and endangered species scenario?

Mr. ADLER. The thing with the endangered species habitat and wetlands is that those conditions change. What is a wetland 1 year is not necessarily a wetland the next year. This is something that is in every elementary biology textbook. The natural environmental cycles cause wetlands to be created and destroyed naturally. Similarly, habitat, what is habitat one year may not be habitat the next, and certainly species that is not endangered one year is going to be endangered the next. So the mere existence of the Endangered Species Act or section IV of the Clean Water Act does not let landowners know which lands are going to be subject to control under those acts and certainly does not let landowners know whether or not their permit applications are going to be accepted or denied by regulatory agencies. It is really the permit denials, which is where the taking really occurs in those cases.

Senator THURMOND. Senator Biden?

Senator BIDEN. Thank you very much, Mr. Chairman. I would like to stipulate at the outset there are a number of foolish regulators, but the question is does that warrant this kind of change?

Let me ask you a few questions, if I may, and I think I have questions for each of you.

Does nuisance law, and I would ask either Mr. Wilkins, Mr. Adler or Mr. Sax this question, does nuisance law cover discrimination law?

Mr. WILKINS. Nuisance law traditionally certainly hasn't covered discrimination, but I think there has been one point about nuisance law that I would like to make clear in relation to your opening statement and its applicability here.

Nuisance law certainly proved adequate during the teens and the 1920's when the court was vigorously protecting private property rights to make sure that use of your property to harm another did not result in a compensable taking. The cases cited by Professor Sax, *Miller v. Schoene* and *Mugler* in Kansas involving diseased trees and liquor protection were essentially nuisance cases from

that period. So nuisance law, at any time when we have been able to look at it in actual operation, has been sufficient to protect the public interest. The concept of nuisance is that there are certain uses of your property that you cannot undertake because of their harmful impact on the public interest.

Now nuisance, as a common law regulatory tool, may have some limits. It cannot, as itself, fulfill all of the needs of the modern regulatory state. But the principle of nuisance that is being invoked here is not the regulatory aspects of nuisance. It is simply the fact that there are some uses that are so inherently harmful that they cannot constitute a property right in and of themselves. That concept is what this law is adopting and that concept is exceptionally broad and exceptionally flexible, and I think, in the hands of Federal courts, would probably even cover such things as discrimination.

Mr. SAX. Excuse me. May I, Senator?

Senator BIDEN. Mr. Sax?

Mr. SAX. The answer is, no, and the statute doesn't say what some court might like to develop. It says whether it is a nuisance in the State, and it is not.

Senator BIDEN. Would you be willing, Mr. Adler, to have the law amended to make it clear it does protect antidiscrimination?

Mr. ADLER. It doesn't affect any laws that are already on the books, Mr. Senator, so I think that the existing civil rights laws would be certainly protected and would not be affected. I also think the 33 percent threshold. I think you would be hard pressed to find a business owner anywhere that is somehow going to suffer diminution in their value of their business or their property because they are forced to allow more customers. If, for example, civil rights law were to say that, let's say, an airline had to reserve 10 percent of all of the seats on a plane for people of a particular group, I think the Supreme Court currently would hold that to be a taking, whereas, it wouldn't hold something like the civil rights act—

Senator BIDEN. Currently it would?

Mr. ADLER. If a landowner was forced to reserve a specific portion—

Senator BIDEN. No, no, you didn't say that. You said an airline reserved 10 percent of all of its seats—

Mr. ADLER [continuing]. For a particular group.

Senator BIDEN. [continuing]. For a particular group, that would be a taking?

Mr. ADLER. I think the Supreme Court probably would consider that a physical occupation taking, yes.

Senator BIDEN. I would be very appreciative if you could, since I only have 10 minutes, if you could elaborate on that for the record.

Mr. ADLER. Certainly.

Senator BIDEN. Let us suppose that a manufacturer of a food snack that is especially high in fat comes along and the FDA comes out with a regulation that requires all food manufacturers to label their products, and then, as a consequence, tells the consumer what is inside that package. Once the word is out on the fat content of the product, sales drops precipitously. Clearly, your product isn't a nuisance, and it isn't necessarily even dangerous. So you are

not doing anything really wrong or harmful, and as I read this bill, the Government might very well have to compensate you for the business loss that occurs as a consequence of that regulation. How would you read that?

Mr. ADLER. I would read that differently because what is causing the devaluation is not the labeling requirement but the fat content. This law does not say anything that affects the value of your land results in compensation. If that was the case, changes in interest rates would result in compensation. The point is—

Senator BIDEN. It says, "The definition of property includes 'any interest understood to be property based on custom usage, common law or mutually reinforcing understandings.'" Wouldn't inventory be part of that?

Mr. ADLER. Again, the regulation is not what is causing the devaluation. It is the fat content.

Senator BIDEN. I see, but they didn't have to disclose that fat content before, and now they have to as a matter of law disclose it. They were doing just fine when they didn't tell anybody how much fat was in it.

Mr. ADLER. There are all kinds of government actions that affect land values that are not directed at the properties themselves.

Senator BIDEN. I understand that. Let's stick to this specific example or any example where the Food and Drug Administration comes along and, as a consequence of what they tell you you must do relative to your packaging, it has the effect of causing you to lose significant amount of profit.

Mr. WILKINS. Mr. Biden, there are many, many cases in the takings area that are directly analogous here. For example, government regulation, in just a traditional pure vanilla sense, may move a road. Because of moving a road, they have to pay the people where they take their land to move the road, but as a result of moving the road, the neighborhood grocer three blocks over who used to be by a major thoroughfare goes out of business. He simply does not have a takings claim because takings law only affects the property interests which is directly affected here.

If government regulation on labeling made it so that it was 33 percent more expensive to put your product directly on the market, then you would have a takings claim. If, as a result of consumers reading that label they no longer buy your property, you would fall into the well-established category of cases that you are just like the grocer who is now cut off from a major artery.

Senator BIDEN. So you have no concern then about the definition of any interest understood to be property based on custom usage, common law or mutually reinforcing—

Mr. WILKINS. Absolutely not. In fact, what that does is invoke the very line of cases that I just cited to you, and it would prevent those kinds of hypothetical horrors. That is exactly what they are merely hypothetical horrors.

Senator BIDEN. I see. You are very good at hypothetical horrors, too. I am just trying to figure out if this thing ends up being passed, I would like to make sure that we have a record that it doesn't include all of these horrible notions.

Mr. WILKINS. It would not.

Senator BIDEN. Let's say that you run an apartment complex that caters only to single people or couples without children, and it is very profitable because your tenants don't like having kids around, and you can charge a premium for a child-free living environment, which is actually happening. That is a real live market force that is out there now. Now let's suppose that we in Congress come along and pass a law that says you can't discriminate against families with children any longer, and you lose your ability to charge a premium, and your profits drop. Do you think the Government should have to compensate for those lost profits under this new law?

Mr. WILKINS. Again, the concept of private property ownership and what you own is itself a very difficult question because this statute does not affect, in any wholesale manner, the notion of what property means. Property is always owned and held subject to government regulation and, depending upon the regulatory scheme in which a property owner, in this case, it may be an apartment or condo operator, that property might be such that the court would say there has been no property interest here affected.

Senator BIDEN. But they could say, based on your explanation, that, yes, there is; right?

Mr. WILKINS. They could, but again you have a problem. You have two levels; first, there may not be an effect to the property interest because the court may say you didn't have a property interest. You had no expectation that these regulations wouldn't change. And, second, even if they did change, the 33½ percent threshold here is very, very high. There are limited, limited governmental actions that are going to directly affect regulation that much.

Senator BIDEN. My time is about to expire, and I would like to ask one more question. But, clearly, you put discrimination laws in play in a way that they are not now. Absent that statute, is there any question in anybody's mind that that is challengeable under the takings clause of the fifth amendment and the present jurisprudence of the fifth amendment?

Mr. WILKINS. It is challengeable now. You would not prevail simply because the courts, under current law, would say you would have to take the entire value before they would even listen to you.

Senator BIDEN. Let me ask one more question, and I will stop, and it is a very short question, Mr. Chairman, with your indulgence.

I would like to ask Mr. Eckel this question as well. Let us assume that this is the first time, specifically by definition, contract rights are included in the definition here. Let's assume the example I gave before. We have a contract right. We, the Federal Government, essentially contract with the farmers. In the Delaware Valley we do that because of the use of water in the Delaware Valley and how we, in fact, make sure farmers have "X" percentage. In the West we do that, and there is a certain amount of water guaranteed to flow from Federal projects, subsidized by Federal taxpayers, to farmers and ranchers in the West, for example.

Let's assume because of an extreme drought or extreme circumstances a contract that is in place saying that you get "X" amount of water per "Y" amount of payment, that that contract is

changed because circumstances are changed. Would that, under the meaning of this legislation—first, I would like to ask Mr. Adler and Mr. Wilkins whether it would fall under the definition of a “takings” in this legislation and, B, if it would, is that what you would anticipate, Mr. Eckel, as being something that is compensatable under this law? Could you, gentlemen, answer that question?

Mr. ADLER. First of all, Senator, I would point out that, where contract is defined in the bill, it says that “* * * such rights shall not be construed under this title to prevent the United States from prohibiting the formation of contracts deemed to harm the public welfare.”

Secondly—

Senator BIDEN. What does that have to do with anything?

Mr. ADLER. I think the point is that the Federal Government will still be able to prevent the formation of contracts. Secondly, the Constitution, and I don't—

Senator BIDEN. No, no. You misunderstand my question. We make the contract. The Federal Government makes the contract with the rancher in the West. We tell them, “We will give you ‘X’ amount of water, we will see you water for this price. We will let you graze on the Federal lands for this price,” and then because of an environmental problem or a serious dilemma, like a major drought, we say, “We can't sell you water at this price.” The bean farmers in the San Joaquin Valley will not get the water at the same price. The water price is going up. The contract is unilaterally changed at this end. Does that create a cause of action with the farmer in the San Joaquin Valley saying, “I was paying \$10 and now I am paying \$20 an acre”?

Mr. ADLER. I don't think the issue is this bill, Mr. Senator. I think the issue is what contract did the Federal Government bind itself to? The Federal Government is no more free than anyone else to merely violate contracts at will. If the Federal Government has said it is going to provide something at a certain price for a certain number of years, and that contract is explicit, the issue is that contract. The issue is not this law.

Senator BIDEN. But it would be a takings, though, because we don't define—

[Mr. Wilkins shook his head no.]

It wouldn't be a takings? It wouldn't come under this law?

Mr. ADLER. I don't think it would be a takings. I think the Government would be worried about having violated a contract.

Senator BIDEN. My time is up. I will come back to it.

Senator THURMOND. Senator DeWine, I want to say, as president pro tem of the Senate, I have got to go and preside over the opening of the Senate, and I will turn the hearing over to you.

Senator DEWINE [presiding]. Thank you, Mr. Chairman, I will stay here for a moment, and then I will come up.

If I could ask each one of you a question, just yes or no, and then, as they say in court, you can explain if you want to.

If this bill becomes law, are we going to see more lawsuits, the same number of lawsuits or fewer lawsuits? Mr. Wilkins, let's start with you.

Mr. WILKINS. That is a little difficult because you have to peer into a crystal ball. I think because of the——

Senator DEWINE. We have been doing that all morning. [Laughter.]

Mr. WILKINS. Because of the administrative scheme that is set up for small compensation claims, you might see somewhat fewer actual lawsuits. Now because you actually will have a limit that says the Government can only take a third of your property value prior to the time that they have to pay you something, there may be an actual increase. What is happening now is people have hypothetical constitutional rights because they know that, hypothetically, the Constitution protects their rights to use and own property, but because the jurisprudential tests are so flexible and provide such limited protection, that it takes a very wealthy individual indeed to have the ability to go to court.

This will give, contrary to what I have heard some people say, rights to the vast number of people in the middle class. I don't see this as an antimiddle class piece of legislation at all. This is going to protect the property rights of the vast majority of Americans who now have constitutional rights only if they are wealthy enough to fight the entire Federal Government.

Senator DEWINE. But it is not self-enforcing.

Mr. WILKINS. It is not self-enforcing, so there will be——

Senator DEWINE. More lawyers.

Mr. WILKINS. There will be lawyers involved.

Senator DEWINE. More work.

Mr. WILKINS. But I would guess, also, that because the rule is clear and the line is fixed, that the litigation will be somewhat simpler and more expeditious than current litigation.

Senator DEWINE. Mr. Adler?

Mr. ADLER. I think that you might see, initially, a slight, some increase, but I think, in the long run, there wouldn't be much of an increase. First of all, agencies are going to be required under this law to look before they leap. So they won't be engaging in actions that would cause takings and give rise to lawsuits. There are alternative dispute resolution mechanisms. Title V of the act, specifically, deals with the two laws that would probably give rise to the most litigation and presents an administrative procedure to avoid litigation in that case as well. So I think that, in the long run, you would not see a dramatic rise in litigation, and I think the CBO study also addresses this point and suggests that most cases that do arise in the future would be dealt with through things like arbitration and not through litigation.

Senator DEWINE. Mr. Sax?

Mr. SAX. I think anybody who thinks when you pass a law that says you can be compensated by the Federal taxpayers when your property is reduced, any affected portion of your property, is reduced by 33 percent, thinks that isn't going to create a great burgeoning of lawsuits must be smoking something pretty strong.

Senator DEWINE. Ms. Pierce?

Ms. PIERCE. We have a situation in our district in the county right now in which two homeowner associations have current suits and two others would have liked to, but the resources were not available. It is difficult to predict on the local level, but certainly

the financial ability of someone to sue to protect their property rights is a major factor.

Senator DEWINE. Mr. Eckel?

Mr. ECKEL. Mr. DeWine, as a farmer, I am an eternal optimist, and I believe the whole intent of this legislation is to reduce litigation and the assessing of cost, the potential cost on the regulator, I am absolutely confident will, for the first time, cause them to look at the implications of their actions before they move on them, and that would have to diminish the activity that occurred.

I think, secondly, making the administrative procedures smoother and less costly is critically important. The farmers and ranchers that I represent, for the most part, do not have significant financial resources to pursue a constitutional law question and, unfortunately, the real-life illustrations that I would use this morning are illustrations where the farmer has exhausted his resources and lost everything that he had in pursuit of constitutional remedy. We believe this would streamline it and lessen the cost.

Senator DEWINE. Mr. Eckel, I am the father of eight children, and my wife says that, by definition, that makes me an optimist or something else, I don't know. [Laughter.]

But I am not as convinced as you are that this legislation won't mean a lot more lawsuits. So I am, frankly, not very optimistic about that.

Let me ask the panel a similar question. Let me ask you a question and, again, we will start with Mr. Wilkins. Is this going to be more bureaucratic work, more regulation or less and let me, as a preface to that, read from the bill. On page 20, subject to paragraph 2, "All agencies of the Federal Government shall complete a private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation or related agency action which is likely to result in the taking of private property."

Then when you turn over to the next page, "A private property taking impact analysis shall be a written statement that includes * * *" and it goes on " * * * the specific purpose of the policy, regulation, proposal, recommendation or related agency action, an assessment of the likelihood that the taking of private property will occur under such policy, regulation, proposal, recommendation or related agency action * * *" and then it goes on for three more paragraphs.

Mr. WILKINS. Certainly, it imposes some more procedural hurdles for an administrative agency, and so if you are asking will this reduce administrative workload from the perspective of an administrator who is trying to comply, he may say it is another requirement. At the end of the day, I believe that it will reduce administrative workload because, by making these kinds of analyses, they will determine that perhaps certain kinds of regulatory effort should not be begun in the first place.

Mr. ADLER. I would echo that statement. I think the real issue is what does this do to regulatory agencies in terms of considering the regulations that they are going to propose and the fact that undertaking these analyses, regulatory agencies will take more consideration about the impacts of their regulations before even beginning that process. So, certainly, in terms of the regulatory harassment and bureaucratic work that private property owners will have

to do, it will be far, far less than at present, and I think that is something that we need to recognize. The Government always has to make impact statements about the environmental impact, about energy use impacts of all kinds of different regulations. To add one small requirement, the impact on private property to that list is hardly a dramatic imposition.

Senator DEWINE. Mr. Sax?

Mr. SAX. I would like to refer you to the letter that Secretary Babbitt sent back in May in which we detailed some of the increased workload that we thought this would create, and I just want to reaffirm that we think it would significantly increase the administrative workload and the costs associated with it.

Senator DEWINE. Ms. Pierce?

Ms. PIERCE. I believe that is the case on the local and the State level.

Senator DEWINE. Mr. Eckel?

Mr. ECKEL. Senator DeWine, I think that it would increase the workload at the Government level, but reduce the workload of the individual, and the question then becomes are we interested in serving the public or are we interested in serving the Government?

In reference to your last question, the concern about increased litigation, the one thing that is occurring today, many times they say, "Well, we don't see a lot of farmers before the Supreme Court." That is because they can't afford the current process. So, if, in fact, your suspicion was correct that there was more litigation, I would argue that that would be a very good thing, and it would be good because at last property owners or farmers would have an opportunity to represent themselves that they cannot afford today through that administrative process.

Senator DEWINE. Third round. What is this going to cost? Mr. Eckel, do you want to start?

Mr. ECKEL. I have not seen a fiscal note for that, but I would ask the Senator to allow me the opportunity for American Farm Bureau, through me, to provide that information to you.

Senator DEWINE. Ms. Pierce?

Ms. PIERCE. We can't put a price tag on it at the moment.

Senator DEWINE. Mr. Sax?

Mr. SAX. Again, as you know, Director Rivlin submitted an estimate saying that the estimate would be several times the figure for the House-passed bill, which was estimated at some \$28 billion.

Senator DEWINE. Per year?

Mr. SAX. I believe it was over a 7-year period.

Mr. ADLER. Senator, I would refer you, first, to the CBO estimate, which says it should have negligible costs. Secondly, with regard to the OMB estimate, the Administration has simultaneously maintained that there are no takings resulting from these environmental laws. Yet this bill would expose the Federal Government to billions and billions of dollars in liabilities. These things can't both be true. If Ms. Rivlin's estimate is accurate, then she is acknowledging that the Federal Government is taking private property through regulation on an unprecedented scale.

Mr. WILKINS. The only basis I would have is the Congressional Budget Office report that I read this morning, and it suggests that the costs would be negligible.

Senator DEWINE. My red light is on. Senator Biden?

Senator BIDEN. If you would like to continue this line, I will wait because it is just you and me.

Senator DEWINE. Why don't you go ahead. I'll rest a while. The witnesses can put up with both of us.

Senator BIDEN. Mr. Adler, I find your last statement interesting. You said that Rivlin can't have it both ways. She can't say that there are no takings and that this bill would cost billions. Isn't she saying there are no takings under the present law, but that this changes the definition of takings and the scope of it, therefore, under the new law, if it were to pass, it would cost billions because, by the very nature of the change in the definition in the way takings are determined? How is that inconsistent?

Mr. ADLER. First of all, I don't think the law has been changed that much, and we may disagree on that. But—

Senator BIDEN. It is being changed.

Mr. ADLER. Yes, but not nearly so much as—

Senator BIDEN. I just want to get your logic here. You are pointing out that it is illogical for her to claim both. Let's not argue about whether it is \$1 or \$27 billion or \$900 billion. Is there anything logically inconsistent about her saying that, A, under the present law, there are no takings, but if the law changes, and by definition we are changing the law, even if it is one one-hundredth of 1 percent, under the new law there will be more cost to the taxpayer. There is nothing inconsistent intellectually about that, is there?

Mr. ADLER. First of all, that is not the way Ms. Rivlin presented it at the Senate hearing in the Environmental Public Works Committee. Her response was the Federal Government is going to just pay lots of claims that they shouldn't pay, and Senator Faircloth and she had an exchange on that.

Senator BIDEN. Let's just pretend it is a logic course. Let's not get into anything else. I just want to get this straight. If you change the law, then it is arguable that you have changed the liability; correct?

Mr. ADLER. Correct, but that was not the argument that Ms. Rivlin was making.

Senator BIDEN. Of course it was.

Mr. ADLER. No—

Senator BIDEN. Sure it was. She said under the present way in which the law is read, there are no takings, but this law will change. The only thing she is responding to is what will the effect of this law be. By definition, if you change the law, then it becomes arguable how much cost, if any, will there be incurred as a consequence of the change. You may argue with her about whether it is \$1, no dollars or to save money or cost billions, but there is nothing illogical or inconsistent about her assertion.

Mr. ADLER. If that had been the way she had phrased the argument and if that had been the way she defended it, that would be the case. I would refer the Senator to the record of that hearing and the exchange she had with Senator Faircloth on that very issue.

Senator BIDEN. That is always an interesting exchange. Let me move on since, obviously, you are not going to respond directly.

Let me ask a few things. I am fascinated, Professor Wilkins and all of you—I am not being facetious or solicitous—I have great respect for your intellect and your knowledge of the law, and I ask this question sincerely because I am not sure I am right, and you may be absolutely right about this.

Under those contracts I referred to where they run from anywhere from 5 to 50 years, where we, the Government, contract with farmers in the West to subsidize their ability, based on the notion of public interest, the more vegetables they grow in the San Joaquin Valley the better off America is. That is our rationale why people in Lancaster and my hometown of Scranton subsidize those folks so tremendously. It always fascinates me, by the way, how they think they shouldn't subsidize our transportation in the East, but I find that kind of interesting. But, at any rate, that is a different policy question. [Laughter.]

But, seriously, the way it works, as I understand it, the contract price for water in the Central Valley Project, which delivers subsidized water to nearly 20,000 farmers, it ranges from \$3.50 to \$7.50 per acre foot. That is how much they pay. The estimates range from the fair market value of that water, if they had to compete for it and pay the fair market value, would be somewhere between a minimum of \$100 to \$250 per foot acre, which is what it would cost you back home, and some have even suggested, for example, quoting from an article by David Frum in The Wall Street Journal on the 16th of March of this year he said, "Beneficiaries of the California Central Valley Project, for example, are now buying water * * *" he says "* * * \$15 to \$20 per acre foot of water that the Interior Department estimates costs more than \$1,850 per acre foot to deliver."

So one is the fair market value ranging somewhere between \$100 and \$1,850 and the other is the subsidized price they are now paying, \$3.50 to the high of \$20 per acre foot, vastly different amounts, fair market value and subsidized.

Now assume the Government comes along and changes the contract before the contract expires, 5 years, and in the 4th year, there is a gigantic drought and, by the way, most of these have written into them emergency provisions, but let's assume it didn't, and there may be some. I don't know enough about all of these contracts, but it is the overall principle I am trying to understand.

Mr. WILKINS. Well—

Senator BIDEN. Let me just finish the hypothetical. So we come along and say, "OK, instead of charging you \$3.50 per acre foot, we are going to charge you now \$12 per acre foot," which, by the lowest estimate is \$88 lower than the fair market value of that. Now, when you are suing contract, which is the way you would have to sue now to get any recovery, you are suing contract, is the difference that that person would recover, assuming they were adjudicated due to the Government breached the contract, the difference between the \$3.50 and the \$10 that they were now being charged or the difference between the \$3.50 and \$1,850, which is the fair market value, or \$100, which is the fair market value, whatever the fair market value is determined to be?

Mr. WILKINS. First, I am having a little bit of difficulty understanding the relevance of a contractual dispute because, if there

are constitutional issues raised here, they would be under the contract's clause.

Senator BIDEN. But right now they are not. Right now the way these things are adjudicated, as Mr. Adler pointed out, is they have a cause of action.

Mr. WILKINS. They have a cause of action for breach of contract.

Senator BIDEN. For breach of contract.

Mr. WILKINS. And if there is a constitutional limit on the Government breaching its contract, it would come about perhaps on the contract's clause imposing it on the Federal Government through the back door of the fifth amendment or something like that. I don't know exactly how the argument would go. But your measure of recovery would be the difference between your contract price and the new price that the Government is seeking to impose upon you.

Senator BIDEN. That is what I thought. Now, again, there may be a clear answer for this. In the legislation, it makes—what page is that determined where—I refer to page 13 of the legislation it says, subject to paragraph 1, “* * * If any agency action directly takes property or a portion of the property under section A, compensation to the owner of the property that is affected by the action shall be either the greater of an amount equal to, one, the difference between the fair market value of the property or a portion of the property affected by the agency before such property became subject of the Government's specific regulation and, two, the fair market value of the property or portion of the property would such property become subject to an agency action.”

Mr. WILKINS. Yes, but Mr. Biden, the only way that would come into effect is if the Government said, “We are simply not going to sell you water, period.” If they took away the contract right completely, then you may have to wonder about application of this statute. If they simply come in and alter the contract and alter the terms of the contractual terms, then all you have got is a breach of contract action and the statute has no application.

Senator BIDEN. Let us assume now, though, because what is very plausible in the droughts that we have had is they come along and say, “We have a choice. We have a choice between eliminating access to water, the diversion of water into the San Joaquin Valley or letting the folks in Los Angeles have water to drink, and we are, temporarily, a year, a month, we are eliminating access to government-regulated water that is brought about as a consequence of the Federal Government spending money diverting water from its natural course to their fields. We are going to eliminate.”

Mr. SAX. May I jump in?

Senator BIDEN. No, you may not yet.

Mr. WILKINS. Again, I am not certain that this act would apply because, in those circumstances, there is the nuisance exception and those old cases.

Senator BIDEN. What have they shown in the nuisance exception?

Mr. WILKINS. *Miller v. Schoene*, a very old case that I think was indirectly referenced by Professor Sax, involves the State coming in and saying, “We have either got to cut down those red cedar trees or all of the apple trees are going to die. It is the exact, same kind

of situation. We have got to cut off water access or we are going to have this worse disaster.

Senator BIDEN. I see.

Mr. WILKINS. In those circumstances, the Supreme Court, back in the heyday of substantive due process, when they were tying the hands of the legislatures right and left, said the legislature had the right to cut down the red cedar trees.

Senator BIDEN. Got you.

Mr. WILKINS. Nothing in this legislation changes that, and your hypothetical would be well within the nuisance exception, as drawn from those very old cases.

Senator BIDEN. Interesting. Now, Mr. Sax, and then my time is up.

Mr. SAX. If I may, I think your example is a perfect one to demonstrate just how radical a departure this bill is from the existing law and constitutional interpretation and how it would create unintended results, I think, even from the perspective of its most ardent opponents.

Let me give you this example.

Senator BIDEN. Supporters or opponents?

Mr. SAX. I am sorry. Supporters. The Bureau of Reclamation, for some very good reason, decides that it cannot deliver all of the water that it has been delivering to its contracting irrigators. It would have the right to do that under the existing law. It would have the right to cut back that use, but this bill creates Federal property law that is different from state law, so that, for example, in the State of Utah, in order to have a property right and water under State law, you have to have a permit, but there are people who have been taking water from many reclamation projects who do not have a State permit or people who have been using water for many years that belongs to the Reclamation Project.

Under State law, they could be cut off for taking this water for which they have no permit and they would, of course, get no compensation. But if you try to cut them off now, they can argue, plausibly, that under the provision of custom and usage, that they had been using this water for a long time, and they are entitled to that water. This is a problem in many States. This is the law in many States. If you cut off water for some good reason for someone from a Federal Reclamation Project that you could cut off under State law, for example, the State, as in California or Idaho, has a public trust doctrine so that you could require people to make releases, they could argue that under custom and usage they now have a federally created property right, even though they don't have a State property right. Yes, that they have a federally created property right and, under this bill, you would have to compensate them at the market value of the water, exactly as you have pointed out, which may be \$250 an acre foot, even though they are only paying \$7 an acre foot because this bill articulates what property rights are as a matter of Federal law, which you can be sure will be argued by people to create a property right, even though it may not exist under State law.

Senator BIDEN. Professor Wilkins, is that plausible?

Mr. WILKINS. I am not sure because this law, the way I read it, does not create Federal property laws. It says, "Private property or

property means all property protected under the fifth amendment of the Constitution of the United States or any applicable Federal or State law."

This statute does not create property rights. You would have to go back and look at any particular Federal regulatory scheme and say, "Does this Federal regulatory scheme create property rights?" I am not an expert in the Federal water law, so I can't say.

Mr. SAX. It says, "* * * protected under Federal or State law or this act."—or this act.

Mr. WILKINS. Again, the operative provisions of this act do not define property rights anywhere. "Property rights are defined as property rights that are independently protected by the Constitution, applicable Federal or State law or this act * * *" I think they mean—

Mr. SAX. I beg to differ. It says, "Private property means under this act and includes * * *"

Senator BIDEN. Let me interrupt here, if I can, because my time is up, and I am not the chairman, and I appreciate the chairman's indulgence here. I think you may be arguing about different sections. Page 8, section 5 says, "Private property or property means all property protected under the fifth amendment to the Constitution of the United States, any applicable State or Federal law or this act and includes * * *"

Mr. WILKINS. Right.

Senator BIDEN. And then it lists things that, to the best of my understanding, and, again, you may want time to take a look at this. I don't expect you to know off the top of your head. I would appreciate your doing a little brief for us on this, if you would be willing, for the record, but it then, as I understand it, and I am no expert on property rights and what constitutes the distinction between Federal/State, but it lists items which I was not under the impression that are Federal property rights. I may be mistaken, but I would appreciate it, and maybe you could do a little—I don't want to make a lot of work for you—do a little brief for us on that question, whether or not subsection 5 on page 8, the definition of property rights where it says, "* * * or this act," whether we are, in fact, increasing the number of those things or whether we are creating any Federal property rights that do not now exist. Mr. Adler, I would invite you to respond to that, too, not now necessarily and, again, I thank my colleague. I am over my time. I hope he takes more time because I have got one more round of general questions I would like to get to, if I can, since this is our only panel.

I yield the floor. Thank you, again.

Senator DEWINE. Thank you. Let me follow up, if I could, to Senator Biden's question, but maybe get a little more basic. Let me refer you to pages 13 and 14 of the bill, and that section talks about compensation; how compensation is determined. It states at the beginning of page 14 that compensation is determined, "* * * the difference between the fair market value of the property or portion of the property affected by agency action before such property became the subject of the specific governmental regulation."

Explain to me your understanding of what that means; "became the subject of a specific governmental regulation." What is that point in time and give me a couple of examples.

Mr. ADLER. For that provision, if there was a law requiring that particular properties were used in a particular way when that law took effect.

Senator BIDEN. Give an example. Can you think of an example?

Mr. ADLER. If a law declared an easement across particular lands, let's say, a particular act to protect a particular species and define which properties were affected in that law or made clear which properties were affected in that regulation, that would have an effect. That is one example.

The ones, I think, that are going to be more in play are going to be the second clause where you are talking about specific agency actions, when you are talking about things like permit denials and things of that nature.

Senator DEWINE. Walk me through that second part again. You are going a little too fast.

Mr. ADLER. I think we were talking about Endangered Species Act and Wetlands, and my focus has been environmental law. What the difference is going to be is when a landowner was informed that they were not able to develop their property, for example, when a wetlands permit is denied, the landowner is finally told by the Federal Government you cannot build a home or you can't plant a flower bed. To give you an example, the first case would be something like, let's say, the Fish and Wildlife Service declared a critical habitat and declared the area that was covered by that critical habitat, within that area, certain lands are not going to be able to be used without what is called an incidental take permit or a bird letter. So that regulation would cause devaluation, and there have been cases, and, in fact, I don't believe it is in this testimony, but in other testimony I gave a case of a woman in Texas who had a property devalued by over 90 percent merely by the designation of her land as habitat in the regulations. So the day that regulation was issued, her land was declared habitat, would be the day it took effect.

Senator DEWINE. That is the key date. The other key date is when I acquired the property.

Mr. ADLER. Right. It would not be when you acquired it. It would be just prior. It says, "* * * before such property became the subject of specific government regulation." So it wouldn't be when you acquired the property. It would be just prior to the regulation.

Senator DEWINE. Let's take it a step further. I am a speculator. I buy property, and I bought this property, and I knew that there was this law on the books that says that it may get designated some day a certain way, and I know from the scientific data that I have that says, "Yes, they may get around to it in 2 years," and I buy it. So now I get compensated?

Mr. ADLER. If you accept that example, your best-case scenario as a speculator—

Senator DEWINE. That is a worst case scenario, to me. [Laughter.]

Mr. ADLER. If you were going to speculate that way, first of all, I would suggest you wouldn't be in business very long because all

you would do is get your money back. You wouldn't make any profits on your deal. You would buy the land and——

Senator DEWINE. Oh, no, no; the person who bought it, what if it has already been—you don't know what price I paid for it necessarily.

Mr. ADLER. We know what the market value of your land is. All you are doing is getting that back. You are not making some huge profit. If the land is worth \$100,000, the Government comes along, regulates it and it is now worth \$30,000. At best, you are going to get the difference. You are back where you started from, except for all of the time and effort you have put in to defend yourself.

A speculator who would use this law or would try to use this law to make a lot of money would go broke. You would be spinning your wheels. You would not make tremendous profits because all you would get back is what you already had. You don't get some hypothetical amount of money that you can dream up. You get back what the land was worth. You get back the value of your pre-existing assets, and I should also point out that in this law, I believe, and let me check on the section, the Government essentially takes whatever the property owner pays you. It takes that property interest. So you can't do it again, and again and again. Once you are compensated, that title is transferred to the Government.

So you have done it once. You are back where you started from, except you wasted a lot of time. You wasted a lot of time with your lawyer.

Senator DEWINE. Senator Biden?

Senator BIDEN. I would like to stay on this. I have two questions to followup on that. What about the circumstance where you have a case where someone goes in knowing ahead of time because they have done the work that there is an endangered species in that woods, buys it at a reduced price because the value of the property is just down across the board, like it is in my State now because of the economy, holds onto it a little bit, property values go up. It has now increased 20 percent in value. They know that the spotted owl or some endangered species is in there, and they go for a permit to clear cut knowing full well they are not going to get it.

They are entitled to the value of the land I would assume at its highest value just prior to them being denied the permit; right?

Mr. ADLER. It is market value just prior to permit.

Senator BIDEN. Yes, just prior to it. So that is how they would make money; right?

Mr. ADLER. They would be better off, if they knew what the Government was going to do, they would be better off selling the land just before the Government regulated. Why waste all of the time to apply for a permit, wait around and get your permit denied, hire a lawyer, go through this arbitration process, when you can simply sell it on the market before the regulation is promulgated?

Senator BIDEN. For two reasons; one, you get the value of the piece of land that you know you are not going to be able to get if, in fact, anybody else finds out what is on there and, secondly, you are going to get to keep the rest of the land that is not included in the denial of the permit, and you get to keep the land itself.

Mr. ADLER. But you have sold the rights to do whatever it is you wanted to do that the Government denied. Let's say you are a big developer. You have sold your development rights. They are gone.

Senator BIDEN. OK; let me ask you to go back to the question the Senator asked about the fair market value of the property or the portion of the property affected by agency action before the property became subject to government regulations. Professor Wilkins indicated that my example of discrimination might very well fall within nuisance.

Mr. WILKINS. It could. That doesn't mean it will.

Senator BIDEN. I am not saying it is, but it may.

Mr. WILKINS. It may.

Senator BIDEN. Let's assume it did for the sake of this discussion. I assume that the guy who owns the apartment complex, prior to us passing the law saying that you can't exclude children, would be entitled to the difference between the value of that complex when you could exclude children and the value of that complex now that you cannot exclude children. Is that a fair example of what before means?

Mr. ADLER. If it wasn't nuisance and if it caused greater than a 33 percent devaluation, which is highly likely—

Mr. WILKINS. And also if you had a property right in expecting that the Government couldn't do that. Again, this notion of property rights, even going back to the list that you said you would like a little briefing on. What constitutes property is so open and flexible that it is not clear at all, to me, that you have a property interest that the Government is not going to change its regulations. I think the cases are pretty clear that no one has a property interest in the Government changing its mind as to what kind of regulatory interest it is going to provoke.

Senator BIDEN. That would be wonderful, in terms of my concern about this legislation. That would answer all my questions. If we could stipulate to that and get the authors of this bill to stipulate that and put such a definition in, I will cosponsor this bill, no problem.

Let me ask you a larger question. I realize this doesn't affect zoning because there is not Federal zoning, but applying the concepts you two have applied, now or before the State of Delaware has a bill exactly—the same, exact bill. The State of Pennsylvania has it. Would not this require compensation, were it a State bill, for zoning laws that denied you the ability to use your property?

Mr. WILKINS. No; again, I don't think so.

Senator BIDEN. Why?

Mr. WILKINS. And I think not because, again, property is held and property rights are held subject to your reasonable expectations in holding them. In a case that I have in my written statement—

Senator BIDEN. Let me ask you a question. That is not how this bill defines property rights. The bill doesn't define it—that is the way the law is now—but the bill does not define property rights that way. It changes it.

Mr. WILKINS. It defines it, let's say, life estates, estates for years, in other words real property. All real property, and then it says, "In any applicable Federal or State law." Applicable State law in-

cludes the zoning laws that are applicable to—if you read 5(a), it is under any applicable State law that attaches to real property. All law in a State is subject to zoning regulations and, again, going back to the very old cases, *Ambler Realty*, again, a zoning case decided during the heyday of substantive due process, and the Supreme Court said—

Senator BIDEN. What were the facts in that case?

Mr. WILKINS. It was a challenge to a zoning case. I can't remember precisely. I think someone wanted to build a business in a residential area, and it had been zoned for residential use, and they said you can't stop me from building I think it was a carriage house or something for putting shoes on horses or something like that. I am not exactly sure. Don't hold me to that. I can't remember the facts exactly of *Ambler*, but the Supreme Court in *Ambler Realty* said, "We all hold our property subject to the police power and subject to reasonable regulations, and these kinds of reasonable regulations do not constitute a taking."

As I read, again, this statute, there is nothing in this statute that changes any of that.

Senator BIDEN. I thought there was, and I will go through this. Again, as I said at the very—in my extemporaneous opening here—that is exactly what the definition of the court, even in the substantive due process heyday, said constituted, if you will, the long arm of the Government, "If the Government can show that it is a reasonable regulation under the police power, then it can do it and not have to compensate."

Mr. WILKINS. Right, and *Ambler*, *Necto*, *Mugler* and *Miller*, all of those old cases, back from that very period that you invoked in your opening statement, suggest that the notions of regulations in the public interest and what we call nuisance are intimately involved with what we call property.

Senator BIDEN. I understand that, but they didn't all relate to nuisance. Each of those cases did not relate to nuisance.

Mr. WILKINS. Two of the four did.

Senator BIDEN. Two of them did, OK, very important.

Mr. WILKINS. But all of these notions relate to the bundle of rights that we call property and, therefore, the court, for one reason or another, simply said, "You haven't interfered with the property right." I don't think this act takes upon itself the almost impossible task of defining what is property. It merely says, "Once you have a property right that is defined outside the boundaries of this act, then there are some limits."

Senator BIDEN. That is fascinating, and I would, again, to the extent that you can amplify on that in a written statement, I would truly appreciate it because, if you talk to the authors of the legislation, the express purpose—express purpose—is to change that reasonable standard. The express purpose is to change the notion that a governmental agency need only show that it is a reasonable regulation under their police power. They explicitly and, as Professor Epstein in his book argues, and this is from whence this comes, explicitly argues that the change should be one that you require a common law tort standard to determine whether or not it is a taking. It fundamentally shifts the burden upon the legislative agency and the governmental body from moving to it was merely reason-

able, it is a rational basis for this to occur—that is the language the court has used up to now in those old cases—instead of saying rational basis; that is, for example, one of the things I always wondered the Clean Air and the Clean Water Act. The Clean Water Act says you cannot emit from your property an effluent that has—and don't hold me to the number—more than one part per trillion or billion of a carcinogenic substance. The scientific evidence, when I used to be on the environmental committee, showed that in order for someone to get cancer from water that only had one part per million or billion, they would have to have 7 glasses of water, 8 ounces a glass, 7 times a day for 71 years before it is likely it would induce cancer. But the court said that is not the standard we look at. We just say, "Is it reasonable?" If the Government wants to, in effect, overprotect against people getting cancer, and there is a rational basis for them arriving at it that this is dangerous to the public health, that is enough for us. We are not going to look beyond that.

The express purpose of this legislation is to say, "You have got to look beyond that court, and the standard we want you to apply when you look beyond that is would this rise to the level of a common law nuisance? Would it be a common law tort? If it is not, then the Government has got to pay you."

Mr. WILKINS. Let me just suggest that Professor Epstein would be bitterly unhappy with this statute because this doesn't do what he wants done.

Senator BIDEN. That is the most reassuring thing I have heard all day. [Laughter.]

I mean that sincerely.

Mr. WILKINS. He would be very unhappy with this statute because it does not define property any more than the fifth amendment. The fifth amendment says you can't take private property, but the fifth amendment—

Senator BIDEN. I am not talking about defining property. Let's forget defining it.

Mr. WILKINS. The fifth amendment doesn't define it. This statute doesn't do that.

Senator BIDEN. But what this statute does, doesn't it, Professor, it says, once you define what it is, here is the standard you have to apply.

Mr. WILKINS. It says, once you have a property right, then you can only take as much as 33 percent of that property right.

Senator BIDEN. I've got that.

Mr. WILKINS. But it does not say that property rights include such things as the right to pollute, the right to do all of these terrible things.

Senator BIDEN. Unless I am missing this and, again, this is your field, and I am not an expert in this field, but let me say how I understand this. I wish I had a blackboard for me to understand it, to lay it out clearly. The threshold question is, is it a property right? If it isn't a property right, we are not in the game.

Mr. WILKINS. That is right.

Senator BIDEN. You are not in the game before, you are not in the game now, and you are not in the game after.

Mr. WILKINS. And this statute does not say property includes necessarily the right to pollute, to harm your neighbors and do all of this type of thing.

Senator BIDEN. I understand that, but it begs the question. The next question is property is money I have to take out of my pocket to invest in my property at the request of the Government as well as if the Government runs a highway through my property. If the Government says to this farmer over here, "By the way, I fully agree with your assessment." If I have to take a chance on who is going to take care of the land, I will rest with the farmers. That is where I will take my chance, not industry, not anybody else. I will take my chance with you all. If I had to say one interest group in America can be the one to determine it, I would rest with the farmers. They have got the best track record of anybody.

But that also begs the question you get down to the point where say, OK, this is a property right if I tell you, in order for you to be able to farm, you have to spend \$10 million to dam this or to restrain that or you have to put on your tractors the following implements or you have to put in the ground the following things, that is a property right. You don't have to take it. If I take it out of your pocket, if I tell the chemical company they have got to put a scrubber on top of their smokestack that costs them \$20 million, I am taking their property. That is property. It remains to be seen what I am taking. That is their property, the \$20 million, as well as the smokestack itself.

So, once we define property in a case, and let's leave that open, let's assume this statute doesn't in any way change the definition of property, let's assume we stipulate now that under old law, under common law, under case law and under this law it falls clearly within the definition of property. Now the next question arises, and it is, "OK, the Government wants to do something with that property, wants to affect your use of that property."

Right now all of the Government has to do is to say, basically, if I am going to affect your use of the property and I don't want to have to pay any money for affecting that use, all I have to show is, to the court, that I have acted in a rational way to protect the public health and safety, and we, the Government, say, That means that two parts per billion can cause cancer. Therefore, you can't have an effluent on your property that is more than two parts per billion of such and such a substance.

The debate now becomes what constitutes polluting? The property owners who want this legislation are saying to us, "Hey, wait a minute. We don't want that rational basis standard to work any more. We are into property. We are into the game." No one denies it is property that is affected. Now we are down to what is a reasonable regulation, what constitutes a regulation that exempts the Government from having to pay?

Mr. WILKINS. And that is where Justice Holmes said in 1922 government can't go too far.

Senator BIDEN. Right.

Mr. WILKINS. Courts have essentially said anything short of 100 percent is never too far. This statute comes in and says 33⅓ percent is too far.

Senator BIDEN. But it is not merely the 100 percent. That is a third criteria. The first criteria is what standard will they apply to determine whether or not this falls within the category of a regulation? It doesn't get into the category of regulation whether it is 1 percent or 500 percent, 100 percent or 2 percent. What gets it into the category of regulation is does it fall within the legitimate power of the Government to protect the public health and safety?

Mr. WILKINS. Yes, but the takings clause has always assumed that any action the Government takes is for the public power and safety. The Supreme Court has said it numerous times.

Senator BIDEN. I know what the Supreme Court says.

Mr. WILKINS. The fact that it furthers the public interest is just a given. The question is, assuming it furthers the public interest, at what point must the public pay to get the public interest?

Senator BIDEN. It is not a given that it just has to, that it automatically meets the standard of promoting the public interest. The courts have ruled in the California cases on zoning and access to the land. The courts have made judgments that it does not automatically fit into the category of falling within the police power.

The determination they make, as I have read the cases, is what degree will they scrutinize whether or not it is within the police power. If there is not a rational basis for the Government—for example, the Government can't come along and say, "You know, what we want to do here is we are going to limit your ability to use your property because aesthetically we just don't like the way it is going to affect the public."

Mr. WILKINS. But, again, Senator Biden, nothing in this legislation requires anything other than rational basis.

Senator BIDEN. Yes, it does.

Mr. WILKINS. The court is not going to say we are going to strike down this regulation because it is irrational. The only thing a court is going to say is, "This rational legislation has an effect of taking away 90 percent of value. Therefore, you must pay." If it says, "It has a rational effect of taking away 30 percent," you won't have to pay a thing.

Senator BIDEN. It says, "No compensation shall be required in this act if the owner's use or proposed use of a property is a nuisance, as commonly understood and defined, by background principles of nuisance and property law * * *"

Mr. WILKINS. And that gets back to the first issue that, if it is a nuisance, your property simply does not include the right to use your property as a nuisance.

Senator BIDEN. Exactly. But right now it doesn't have to be a nuisance under common law to be able to be regulated without compensation, but under this it will.

Mr. WILKINS. No; again, it is the difference between using nuisance as an all-encompassing regulatory scheme or nuisance is merely saying this is where property rights end. Nuisance has never been sufficient, as an all-encompassing regulatory scheme. That is why we started passing all of these Federal statutes, but nuisance has been effective and remains effective in saying this is where private property rights end. Private property rights end at the point that your private property use constitutes a nuisance.

Therefore, once there is a nuisance, the Government will not have to pay.

Senator BIDEN. Look, right now the Supreme Court says your private property ends once the use of your property adversely affects the public health and safety of the population, and we determine that to be when we conclude that there was no rational basis for the legislature to have taken that action.

Mr. WILKINS. I think you are confounding, again, the two steps of what constitutes a nuisance and what is the regulatory power. This statute does not alter the nuisance, nor does it alter the rational basis standard of review.

Senator BIDEN. So right now your reading of this statute would be, if a government regulation has a rational basis for its existence, regardless of how much of the property it takes as a consequence, it would not be required compensation.

Mr. WILKINS. If the property interest it is taking is a nuisance, it would not require it.

Senator BIDEN. No, obviously, if it is a nuisance. That is not the question. Now, look, you can't have it both ways.

Mr. WILKINS. If it is regulating a use of private property that constitutes a nuisance, no compensation is required.

Senator BIDEN. No question. But right now the way the law is, if it regulates the use of a property that constitutes a reasonable judgment on the part of a legislature that is going to negatively affect the health and public service, it is not compensatable.

Mr. WILKINS. Unless you take 99.9999 percent.

Senator BIDEN. Right. But it is not compensatable now; correct?

Mr. WILKINS. All this will do is the Supreme Court, since 1922, has said government regulation can't go too far, and that has remained a myth.

Senator BIDEN. So you are saying all this does is define what too far is.

Mr. WILKINS. It defines too far, and that is all it does.

Senator BIDEN. Let me ask you another question then. I can't ask you another question. I am imposing on your time too much.

Senator DEWINE. Please.

Senator BIDEN. I will do it then. Let me ask you another question. [Laughter.]

Because I don't think you are right at all on any of this that you said the last 5 minutes, and I will be delighted to—

Mr. WILKINS. My students will be delighted to hear that.

Senator BIDEN. If you are right, then there is not nearly the problem I think there is with this legislation. But let me raise another point.

Right now there is a 33 percent requirement that 33 percent of the property be effected before it constitutes a taking; right?

Mr. WILKINS. Yes.

Senator BIDEN. It is 33 percent of any portion of the property; correct?

Mr. WILKINS. Yes.

Senator BIDEN. So that, if I have a thousand acres and one acre I am restricted from using, and I am restricted on that one acre to 33 percent, affecting 33 percent of the value of that one acre, then that requires compensation even though it is only one thirty-

third, one one-hundredth—anyway, whatever it would be—I have a thousand acres. It is one acre and 33 percent of one acre.

Mr. WILKINS. And that is true, but, again, that is just necessary because line drawing in this area, someone has to begin drawing the lines. The difficulty with the Supreme Court's jurisprudence in this area is they have been unable to even tell us what property is.

Senator BIDEN. This doesn't tell us either; right? That is what you just got finished telling me.

Mr. WILKINS. It doesn't. It says it is dependent upon existing State law, but it does say that, if you can identify a property interest, if you can identify a segment of that property that is protected under State law, yes, that will be protected. The difficulty with the Supreme Court jurisprudence is it goes on much further. It starts saying the right to look at property is enough. So they said, "Well, so long as you can look at it, you still own it, and, therefore, we haven't taken everything."

Senator BIDEN. I will go to you, Mr. Adler, in a second. Mr. Eckel, as I understand from your group, the Farm Bureau is the strongest organization in my State, as you know, they don't like the 33 percent provision. They say if it is even 1 percent, period, it should be compensatable; is that correct? That is the position of your group?

Mr. ECKEL. The Farm Bureau has believed that when anyone takes something away from you that is yours, you should be compensated for that. Having said that, we are supporting this legislation.

Senator BIDEN. I understand. I wasn't trying to pitch you against the legislation. I just wanted to make sure I understood where you were, sir.

Mr. ECKEL. If a thief stops me on the street today and I have \$50 in my wallet and he takes \$25, I am still going to report that theft and expect that something be done about it. The frustrating thing for me sitting here, Senator, and you and I both are born in the same town, but the frustrating thing for me is that the Committee is dealing with the hypothetical, and I am sitting here thinking about the real life problems at home, and what do I tell Bill Stamp when I go home today? That the Senate is concerned about keeping farmers, who are the best caretakers of the land there, but because of the debate he still loses his land on the 1st of January?

Senator BIDEN. I think you would tell Bill and the rest of the farmers, if this legislation passes, that your ability to determine whether or not Dow Chemical ends up building next to your farm is going to be diminished significantly, and you may be in a hell of a lot more trouble than you ever thought and anything you would gain from this legislation. That is what I would tell Bill.

Mr. ECKEL. But Bill won't have a farm to build next to come January 1.

Senator BIDEN. I don't know the details—I am referring to him as Bill as if I know him—Bill's situation, but I do know that, if this law changes the ability of the farmers in Kent County, DE, to determine what happens when Doeskin or when General Foods or up further when Texaco Oil Refinery and the rest of these outfits de-

cide to move, and they are all in the middle of agricultural areas, will be diminished. That I do know that those farmers are, as they say in parts of my inner-city, in a "world of hurt" if that happens. I don't want to debate that with you now, but I would be happy to tell you what I would tell Bill and what I would tell the Farm Bureau in Delaware.

Mr. Adler wanted to say something, and Mr. Sax wanted to say something, and the Chairman would like me to stop saying anything. [Laughter.]

First of all, in the *Lucas* decision, the Supreme Court majority opinion said quite clearly that their word was unclear whether or not they should focus on the whole tract or the affected portion. I believe that is page 2894, note 7. So the Supreme Court said, "We don't know yet, basically, until we have a case that defines it for us." That was what they said in *Lucas*.

The other thing was the nuisance language in this bill is based on the *Lucas* nuisance language. So the Supreme Court has clearly said, in the case of a full devaluation of your land—

Senator BIDEN. Wait.

Mr. ADLER. I will read from the *Lucas* decision if you would like.

Senator BIDEN. Sure, I would like you to.

Mr. ADLER. "However, no compensation is owed in this setting, as with all takings claims, if the State's affirmative decree simply makes explicit what already in here is in the title itself and the restrictions that background principles of the State's law of property and nuisance already plays upon land ownership." That is from *Lucas*.

What the Supreme Court said in *Lucas* was we are only going to apply that to 100 percent devaluations. Justice Stevens, in his dissent, rightly pointed out that saying 100 percent or 99 percent we are going to apply that standard but not at, say, 50 percent is arbitrary, and he was exactly right. That is why this legislation is moving in the right direction by saying we are going to move from 100 percent. We are going to move it down to 33 percent. The reason we are going for a threshold is because at some level it is diminimus. At some level it is so hard to measure, and I would argue with the authors of this bill whether or not 33 percent is diminimus, but what this bill primarily changes is when you look at the nuisance issue. Do you look at it at 100 percent or you do you look at at 33 percent? The nuisance issue stays the same, and it is based on the clear language of the *Lucas* decision, just as other portions of this bill are based on the *Dolan* decision.

Senator BIDEN. And it is the nuisance law in whatever the State in which the case was raised, and the nuisance law in Delaware is different than the nuisance law in Pennsylvania, as it is in Massachusetts, Rhode Island, et cetera; correct?

Mr. ADLER. But the differences are primarily differences in things like the statute of limitations and things like that on nuisance law.

Senator BIDEN. Oh, no, it goes further beyond. I would be happy to submit a brief to you showing you that is not true, and you know it is not true. It goes well beyond that in various States.

Let me also point out *Concrete Pipe*, which was decided after *Lucas*, unanimous decision on the same issue says that, "* * * a

claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and, hence, compensable. To the extent that any portion of property is taken, that portion is always taken in its entirety. The relevant question, however, is whether the property taken is all or only a portion of the parcel in question." Then it points out further in the decision, it says, "* * * Our cases have long established that mere diminution of value of property, however serious, is insufficient to demonstrate a taking." That is post *Lucas*.

Mr. ADLER. And the latter part of this bill does not change the fact. Mere diminution of value of property is not enough.

Senator BIDEN. The mere diminution of property it says, "* * * have long established that mere diminution of value of property, however serious, is insufficient * * *"

Mr. ADLER. And this bill does not compromise that because it says that there is a nuisance exception. It says it is not enough to say that you lost money. You also have to show that what you wanted to do was not a nuisance. So that is purely consistent with that statement.

Senator BIDEN. I, again, disagree with that. Go ahead, Mr. Sax.

Mr. SAX. May I try to put this in some perspective succinctly. This is a bill that has very broad coverage. It covers, as you pointed out, civil rights. It would cover the Americans with Disabilities Act. It would cover airplane safety. It would cover banking regulation as well as a wide variety of problems dealing with natural resources. Most of those activities are not nuisances, by anybody's standard, and this bill would allow compensation, essentially, at first dollar or first acre coverage for many of those cases because it is 33 percent of any affected portion. So it is a very, very broad, sweeping bill, and—

Senator BIDEN. Let me stop you right there because I think an illustration is important for people to understand this.

Americans with Disabilities, you have to have access to a restaurant. The access to the restaurant then affects the access to the number of tables you can have because you have to have wheelchairs there. If you can demonstrate that that change in the law has affected your ability in that room, which is the one that you have been running as a restaurant, by 33 percent, that is a compensatable item under this legislation, is it not, or arguably?

Mr. SAX. Precisely. It is arguably and perhaps even likely covered, but I think the central point that I would like to underline is that this is a sharp break with the compensability standard that we have lived under for 200 years. You keep hearing it said, "Well, the court isn't doing it right. The court has not gotten it right, so Congress has to do it right."

Now, this is a change from the standard that the country has lived under for all these years. Farms have prospered and continue to prosper under this standard. Mr. Adler mentioned the case of Ben Cone. The case of Ben Cone, which has been much discussed, has, in fact, been resolved, and an agreement has been made with him, with which he is happy. Once they sat down at the table, and there had been a misunderstanding, he is not only complying with the Endangered Species Act requirements, but has agreed to do

more than that on his land, and is delighted with this resolution of the problem.

So we keep hearing these horror stories as if the existing law—and I, again, emphasize which is the law under which we have lived for the entire history of the republic—was somehow making the country fall apart, but it isn't making the country fall apart. We have, I guess, the important point is that the Supreme Court of the United States has tried to struggle with the question of what does constitute basic fairness to property owners from Justice Taney all the way up to Justice Scalia, and they have come up with the system under which we have lived.

Senator BIDEN. An interesting beginning and ending point.

Mr. SAX. It is an interesting beginning and ending point and includes everybody else from 1837 to 1995.

Senator BIDEN. I think he would rather start with Marshall.

Mr. ECKEL. Mr. Chairman, one correction that I would like to make with Mr. Sax. He points out that agriculture has prospered and that these are isolated instances. Let me assure you that I sit here today representing the 4.25 million members of the American Farm Bureau Federation, and it is our policy position that this is a major problem for agriculture. I am not a legal expert, but I am a farmer. I do represent the farmers of this country, and I am telling you we have a serious problem with the current situation.

Senator BIDEN. One last question. What is the Administration doing to reduce the regulatory burdens on farmers, and property owners, wetlands and endangered species unrelated to legislation?

Mr. SAX. To the extent that problems are recognized and, of course, there are always problems with every program, as you know, our view is that there should be a targeted response looking at the particular program. In the area of the Endangered Species Act, a whole series of administrative reforms and legislative proposals have been put forward, including an exemption for small landowners, small impact activities, the so-called Safe Harbor program, which is one of the things that solved the *Ben Cone* case, new information, a wider use of the so-called 4-D Program, where exemptions can be given for threatened species. The deal is a deal program, which has encouraged the use of habitat conservation plans.

In the wetlands area, there has been a general permit for fills of a half acre or less, which covers the vast majority of residential properties in the United States.

Senator BIDEN. And you have made that exception; correct?

Mr. SAX. Yes; so there have been a very considerable number of administrative reforms made, which have tried to be responsive and, I believe, are being responsive—

Senator BIDEN. As I understand, less than 1 percent of all farm-related permits to drain or alter wetlands were rejected last year.

Mr. SAX. My understanding is that the figure is seven-tenths of 1 percent have been rejected, yes.

Senator BIDEN. You are awful kind, Mr. Chairman. Thank you. You have been a wonderful panel. I appreciate your input, and I look forward to the written responses to some of the things you have mentioned, and I am delighted to hear that my good acquaintance from Chicago would be disappointed.

Mr. WILKINS. Oh, he is bitterly disappointed with this. I can guarantee it.

Senator DEWINE. The bad news for the panel is I am not done either.

Senator BIDEN. Thank you very much, Mr. Chairman, for my time.

Senator DEWINE. Mr. Eckel, let me try to respond, if I could, to your question of what you should tell the farmers whom you represent, and you cited one specific example, but, first of all, and I am speaking as this Senator from Ohio, you should not interpret, at least my questions, as indicating support or lack of support for this particular bill. I have had numerous discussions with farmers in Ohio. I think I am aware of the problem, so I think I understand that. I don't think, though, that the farmers that I represent in Ohio would be surprised if they found that this Senator approached this with a little bit of what I hope is healthy skepticism, and that skepticism comes from my, at least, initial analysis that this will be one more piece of legislation, one more law which will spawn a great deal of more litigation, more work for lawyers, more work for bureaucrats and, ultimately, more power for Federal courts. That is my problem with this bill, and that is what I am trying to work through here today or at least begin to work through.

Let me get back to a specific question that I asked earlier, and I am still, frankly, not satisfied with at least my understanding—I will state it this way—I am not satisfied with my understanding of what this bill would do, and I would, again, refer you to page 14, and I would again refer to how the calculation is made of the compensation.

“The difference between the fair market value of the property or a portion of the property affected by agency action before such property became the subject of the specific government regulation.” I, again, will draw your attention to the term “subject of the specific government regulation.”

Congress passes a bill, 1996. That bill clearly contemplates that some bureaucrat some day will issue regulations when they get around to it, and let's say in 1998 they get around to issuing some regulations, and then the year 2000, those regulations are actually applied by another group of bureaucrats to the specific case in point. At what point then, which of those three dates is the date when it became subject of the specific government regulation?

Mr. ADLER. Publication in the Federal Register. That is in the regulation.

Senator DEWINE. Publication in the Federal Register of the regulation, even though it was clearly—anybody who looked into this would know that eventually they are going to regulate, and they are probably going to regulate my property, and they are probably going to tell me, to take an extreme case, I can't do what I want to do. I can't do the specific act, whatever it is. They just haven't gotten around to it yet. Bureaucracy works slowly.

Mr. ADLER. The value of your land is going to fall. So, if anything, as a property owner, you are likely to get less compensation than if the date were set earlier.

Senator DEWINE. But this is a specific question. We are not on merits, and we are not on speculation. We are not on anything. I want to know. Your answer is it is the date it is published.

Mr. ADLER. Yes.

Mr. SAX. May I comment, Senator?

Senator DEWINE. Yes.

Mr. SAX. It seems to me that you have pointed to one of dozens or scores of difficulties and ambiguities in the law, which I think no one can say with certainty what the answer to this is, and I think one can predict with certainty that it is something that will be worked out in litigation. It will be one of the many things that will have to be litigated, as opposed to the notion that this is a kind of magic bullet bright-line standard. I think we could go through—you pointed to one important problem—I think we could go through the bill and identify a very large number of these same uncertainties.

Senator DEWINE. Does everyone agree with the answer by Mr. Adler?

[No response.]

Senator DEWINE. Does anyone disagree, maybe, is a better way of saying it?

Mr. SAX. I think it is by no means clear.

Senator DEWINE. Anyone else?

[No response.]

Senator DEWINE. Just so I understand, Mr. Adler, the Government agency involved goes in, based on this regulation, and then applies it to me and someone else, a lower-level bureaucrat who goes in and makes a determination, "Oh, gee, this particular provision, which was based on a law that was passed before that, this particular provision applies to you, and now it means you can't do what you want to do on your property."

Mr. ADLER. Right. When the regulation is promulgated that makes it clear that land is affected, that is—

Senator DEWINE. It is not clear. You have to interpret it. Someone is interpreting it. Somebody specifically is going out and looking at this property, if it is an environmental issue, doing some tests, et cetera, et cetera, and then making a judgment call, and then making a call which says, "This particular property owned by Mike DeWine comes under this regulation which was based on this law." So you are still saying that it is back to the promulgation of the actual regulation upon which that decision 2 years later is made, even though that decision 2 years later could have gone either way.

Mr. ADLER. The only qualification I would make is if, for example, there was a regulation that was clearly open-ended and expecting some later agency determination about what properties are particularly affected, then it might well be the agency's determination because the regulation would probably be written in such a way as that it doesn't affect the properties until such time as the agency makes that determination.

But, I think, these types of questions are questions that the courts often deal with, and I think that the question is—

Senator DEWINE. That is my fear.

Mr. ADLER. I think, if the question is that that is unclear, if that is a major problem with the bill, then all that would be necessary would be to include something to say, "Publication in the Federal Register" or to say, "The issuance of a particular permit denial or action." That type of fine-tuning of a bill is usually relatively easy.

Senator DEWINE. I am to the moment you all have been waiting for, which is to read the closing procedural statement, as it is written here. Let me do that.

The Committee will hold the record open until Friday at 6 p.m. for anyone who would like to submit written testimony. Any Senator on the Committee who would like to submit written questions for any of our witnesses today must do so by 6 p.m. tonight. Please send them to the attention of Larry Block on Chairman Hatch's staff. The witnesses would be advised that any questions they receive they must respond to these by 6 p.m. on Tuesday, October 24th.

So, I guess, that legal brief isn't going to be too long. [Laughter.] Thank you all very much.

[Whereupon, at 1 p.m., the committee was adjourned.]

APPENDIX

QUESTIONS AND ANSWERS

RESPONSE TO QUESTION OF SENATOR DIANNE FEINSTEIN TO JONATHAN H. ADLER

Question 1. In your examples of "victims" of regulatory takings, you mentioned only small landowners. This Administration is doing a lot to protect small landowners, and I urge it to do more.

But I think we need to recognize, in discussing takings issues, that land ownership in the U.S. is highly concentrated. The vast majority of private land is owned by a small percentage of landowners.

According to Professor C. Ford Runge, Agricultural Economist at the University of Minnesota, roughly 78 percent of private land in the U.S. is owned by less than 3 percent of landowners. According to USDA, of the 1,326 million acres of private land in the U.S., agriculture and timber interests occupy around 90 percent. According to Professor Runge, less than 5 percent of all farmers own a majority of all farmland, and less than 1 percent of all timber owners own nearly half of all U.S. timberland.

Small, residential property owners constitute about 75 percent of private landowners in the U.S., but only 3 percent of the land.

According to USDA, roughly $\frac{2}{3}$ of U.S. private land is farmland. As a rule, large landowners have benefitted considerably from governmental actions (agricultural subsidies, water subsidies, highway construction, etc.)

Under a broad takings law, the government would increasingly be required to compensate landowners for any actions that decrease property values, while landowners are not required to compensate government for actions that increase their property values. (Any increase in property taxes is insignificant compared to benefits conferred by the government.)

I have a related point relating to size of landholdings—The Justice Department, in fact, has had very few ESA-related takings cases in its docket relative to takings cases in other areas. On most of the large farmland tracts, flyways can easily be preserved and endangered species protected. Furthermore, large landowners often have the ability to configure their physical structures in ways that can minimize impacts on wetlands or wildlife.

I would appreciate your response to these comments.

Answer 1. Senator Feinstein raises two salient points: (1) the relevance of the distribution of property ownership to takings compensation, and (2) the question of government conferred benefits to property owners.

(1) Who owns what amount of what land is simply irrelevant to the merits of S. 605 or any other takings compensation proposal. Whether the landowner is wealthy or destitute is irrelevant to the Constitutional and ethical issues of whether property rights deserve protection from excessive government regulation.

Any proposal that would provide different levels of protection to landowners with different amounts of land would be arbitrary. There is no basis to extend protections to a landowner with 9.8 acres, for instance, and not to one with 10.2 acres. An across-the-board protection of all property rights is a more equitable and appropriate response.

The Clinton Administration's efforts to reduce the impact of regulatory programs on small landowners may be well intentioned. However, they are ridden with loopholes and fail to provide small landowners with the sorts of protections that they need from excessive government regulation.

Senator Feinstein is absolutely correct to note that large landholders can often accommodate regulatory requirements with relative ease. This is why large land-

owners—and their representative trade associations—have been far less adamant about passing a strong property rights bill than the grass-roots organizations.

In this context it is wise to remember that the benefits of private property accrue not only to the owners of private property but to all that benefit from the workings of the free enterprise system. Private property rights lie at the cornerstone of a free society. As the Nobel Laureate economist F.A. Hayek pointed out: "The system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for those who do not."

(2) It is certainly true that the government provides benefits to citizens by building roads and bridges, providing police and fire protection, and so on. These sorts of public goods are provided for at public expense, as they are paid for through taxes and user fees for government services. The public might well benefit from the creation of wildlife refuges, wetland reserves, and wilderness areas as well, and these should be provided at public expense as well.

There is a fundamental distinction between government actions that incidentally affect land values—positively or negatively—and those that affect property values because they are directed at particular properties. When a government builds a highway, properties near the highway are likely to increase in value, while those alongside older thoroughfares may decline in value. Such changes in value occur with all economic activity, government or otherwise, and should simply not be a factor in discussions of regulatory takings. S. 605 in no way requires compensation for "any action" that decrease property values, but rather only those actions that deprive landowners of reasonable use of their property.

For the record, I would also like to note that government programs that confer particular, directed benefits to particular land owners or interests, such as farm subsidies, are a different matter. Professor Runge is correct to note that such subsidies produce distortions. CEI has long opposed such programs, and believe that the federal government should observe and protect the rights of farmers and all landowners equally, and provide none of them with special rights or subsidies.

RESPONSES TO QUESTIONS FROM SENATOR SPENCER ABRAHAM TO JONATHAN H. ADLER

Questions 1. Mr. Adler, defenders of the status quo in environmental regulation would have you believe that most if not all regulations bring about some public good. But it appears that current law actually creates strong incentives for *anti-environmental* behavior on the part of the regulated community. To cite one example, the fact of the matter is that, under current law, the very worst thing that can happen to a property owner qua property owner is to have his land declared to be habitat for an endangered species. For, in that event, the landowner is severely punished with land-use restrictions. As a result, current law gives landowners a very strong incentive to make sure their property is unattractive to endangered species. The upshot, as I see it, is that we now discourage people from developing their land in a manner that reserves its value as habitat for these species. Mr. Adler, would you agree that these disincentives exist under current law? Are you aware of any real-world examples of this phenomenon?

In your opinion, how would S. 605 change those incentives?

In summary, then, what would the effect of this bill be upon the quantity and quality of endangered-species habitat?

Answer 1. It is certainly true that current land-use regulations, such as those under the Endangered Species Act, often provide incentives *against* the practice of sound conservation. This is illustrated by the case of Ben Cone, the owner of 8,000 acres of timberland in North Carolina. Over the years Ben Cone has deliberately managed much of his land in such a way so to attract wildlife to his property. Mr. Cone has actively and intentionally created wildlife habitat. Through selective logging, long rotation cycles, and understory management, Mr. Cone has been very successful in these efforts, attracting many species to his land, from wild turkey and quail to black bear and deer.

Mr. Cone's good land stewardship has also provided habitat for the red-cockaded woodpecker, an endangered species. In response, the federal government has placed over 1,000 acres of his land off limits to logging, and the value of his land has been reduced by approximately \$1.5 million. This has taught Mr. Cone a lesson: He should no longer manage his land in a way that attracts red-cockaded woodpeckers if he wants to be able to use it. Rather than allow trees to mature for at least 75 to 80 years before cutting them, as Mr. Cone used to, he now cuts them much earlier, as red-cockaded woodpeckers prefer older stands. Moreover, Mr. Cone has accelerated the rate of clearing on his land. It should also be noted that Mr. Cone re-

cently filed a takings claim against the federal government. Even should this case be settled, the damage has been done. Mr. Cone cleared some of his land due to the ESA's punitive regulations, and his story serves as an example of the environmental harm that is often caused by regulatory takings.

Passage of S. 605 would remove many of the negative incentives faced by Mr. Cone and other landowners around the country.

It would be impossible to quantify the expected effect of S. 605 on the quantity and quality of endangered species habitat with any precision. However, one should note that the incentives against conservation produced by regulatory takings are significant. Consider the view of Dr. Larry McKinney, Director of Resource Protection for the Texas Parks and Wildlife Department, who recently wrote in a report published by Defenders of Wildlife that:

While I have no hard evidence to prove it, I am convinced that more habitat for the black-capped vireo, and especially the golden-cheeked warbler, has been lost in those areas of Texas since the listing of these birds than would have been lost without the ESA at all.

As a result of the Endangered Species Act, a law that is enforced on private land through regulatory takings, more habitat for these birds may have been destroyed than if the government had not acted to regulate private land use at all. Given the ESA's poor record in saving and recovering imperiled species (Fish and Wildlife Service claims of success notwithstanding) it is reasonable to conclude that regulatory takings are having a real negative impact on species conservation efforts.

Sound conservation practices will be better served in the long run through respect for private property rights and the use of positive government incentives than by the continued reliance upon punitive regulations.

Question 2. Mr. Adler, we both know that the takings impose costs and that the resources of our society are finite. It is critical, therefore, that we regulate efficiently, without regard to whether the costs of takings are borne by the general public or by a handful of unlucky landowners. But here again it seems that current law has the incentives all wrong. Take the *Lucas* case, for example. There, beachfront property purchased by David Lucas was rendered economically valueless when state regulators blocked him from building a home on it. After Lucas won his case in the Supreme Court, the State of South Carolina was forced to purchase his property. It promptly put the land up for sale. The State received a bid for \$300,000 from a neighbor who wanted to leave the land undeveloped in order to preserve his view. But the State also received a bid for \$375,000 from an individual who, like David Lucas, wanted to build a house on the land. Amazingly, to get the extra \$75,000, the State chose to sell the land to the bidder who wanted to build a house on it. So while the State was willing to spend hundreds of thousands of dollars of David Lucas's money in order to get the benefits of the use restriction at issue in his case, those benefits were not worth even \$75,000 to the State when it was forced to spend its own money in stead of someone else's. That indicates pretty clearly that, in the absence of a compensation requirement like that set forth in S. 605, governments will regulate land-uses in a manner that wastes the finite resources of our society. Mr. Adler, would you agree with this assertion? Has this sort of wasteful allocation of resources had adverse effects upon the environment?

Answer 2. There is no question that when government officials are not held accountable for the costs of their actions, they make poor decisions. As a result, finite resources are wasted, and agency priorities do not reflect common-sense. Forcing agencies to pay for the private property rights that they take through regulatory action will encourage them to examine non-regulatory approaches to achieving their statutory goals.

An example of this can be seen in the case of wetlands regulations, the primary means by which the federal government seeks to prevent the net loss of wetlands. As previously noted, the cost of protecting a single acre of wetlands can reach the hundreds of thousands of dollars due to the costly delays and legal conflicts that the regulatory process produces. However, other approaches to wetlands conservation, such as mitigation, restoration, and the purchase of conservation easements can preserve wetlands at a fraction of the cost. By focusing resources devoted to wetlands conservation on regulatory programs, the federal government is actually less able to achieve the environmental goals it has set out to achieve.

RESPONSES TO QUESTIONS FROM SENATOR ORRIN G. HATCH TO JONATHAN H. ADLER

Question 1. As you know, the much criticized 1905 Supreme Court case of *Lochner v. New York* established a substantive due process standard for reviewing economic

legislation. Some critics of recent Supreme Court takings decisions, as well as of S. 605, claim that the cases and the bill are a throw back to the *Lochner* era. Please comment on this assertion.

Answer 1. There is really no relation between S. 605 and *Lochner*. *Lochner* deals with "substantive due process"—the doctrine that the Constitution's due process requirements can be violated not only by a lack of procedural due process, but also in some cases by the substance of what a contested law seeks to accomplish. In *Lochner*, regulation was invalidated on the grounds that it violated substantive due process.

Substantive due process is regarded by many scholars today as a constitutional doctrine that has been correctly abandoned; a few scholars believe it has merit. But regardless of where one stands on this issue, the question of compensation for takings is really a separate one. The compensation question involves not invalidating laws, but compensating property owners for the damage those laws have caused. In short, S. 605, and the Supreme Court precedents which it codifies, have nothing to do with substantive due process.

Moreover, the recent line of Supreme Court cases on property rights and takings are interpreting the explicit Constitutional guarantees contained in the Fifth Amendment's admonition " * * * nor shall private property be taken for public use without just compensation." Applying this limitation on government power to regulatory actions no more amounts to substantive due process than recognizing that the First Amendment places clear restrictions on the government's ability to regulate speech.

Whether one supports the *Lochner* decision or not (and most legal scholars today do not), the clear language contained in the Bill of Rights to the Constitution make explicit that there are limitations on government power over private citizens.

Question 2. At the hearing, it was argued that there exists a "police power" exception to the fifth amendment's compensation requirement. My understanding is that the Supreme Court in its recent *Lucas* case specifically rejected this contention. Would you please comment?

Answer 2. The *Lucas* Court held that a "police power" exception to the compensation requirement would allow for legislatures too much latitude in avoiding compensation for the taking of private property. This view is drawn from Justice Holmes opinion in *Pennsylvania Coal Co. v. Mahon*. As stated in *Lucas*:

it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'—which require compensation—from regulatory deprivations that do not require compensation. A fortiori the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed. The South Carolina Supreme Court's approach would essentially nullify *Mahon's* affirmation of limits to the noncompensable exercise of the police power. * * * Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

The Court's explicit intent was to prevent legislatures from simply asserting that they are preventing noxious uses under the "police power" and are therefore exempt from any compensation requirement. S. 605 respects this principle.

Question 3. You stated that except for the 33 percent "partial" takings provisions, title II of the bill merely codifies existing case law. Please amplify your testimony and also point out what sections codify what cases.

Answer 3. That regulation can amount to a compensable taking under the Fifth Amendment has long been recognized. In 1922 the Court held in *Pennsylvania Coal Co. v. Mahon* that "if regulation goes to far it will be recognized as a taking." Title II of S. 605 should be seen largely as an effort to make explicit Congress' opinion as to what amounts to going "too far" and to codify existing Supreme Court precedents on this subject.

This intent is clearly observable in Section 204 of Title II, as this language, with the exception of the establishment of a 33 percent threshold, closely parallels that of Supreme Court jurisprudence as to what sorts of government actions entitle property owners to compensation from the government.

For instance, Section 204(a)(1) provides that landowners are due compensation when private property has been "physically invaded." In the case of *Loretto v. Teleprompter Manhattan CATV Corp.* [458 U.S. 419 (1982)], the Supreme Court held

that physical occupations of private property are *per se* takings that are compensable under the Fifth Amendment.

Section 204(a)(2)(A) provides for compensation when a government action that takes private property and "does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based." This standard is to be found in the case of *Nollan v. California Coastal Commission* [483 U.S. 825 (1987)].

The "rough proportionality" test in Section 204(a)(2)(B) mirrors the Court's ruling in *Dolan v. City of Tigard* [114 S. Ct. 2309 (1994)] that "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment."

Section 204(a)(2)(C) draws from two cases. Providing for compensation when a government action deprives the landowner of "all or substantially all economically beneficial or productive use of the property" is essentially the standard adopted in *Lucas v. South Carolina Coastal Council* [112 S. Ct. 2886 (1992)]. The inclusion of government actions that do so only "temporarily" is based upon the Court's ruling in *First English Evangelical Lutheran Church v. Los Angeles County* [482 U.S. 304 (1987)].

S. 605 provides that compensation should be paid when a government action fails to meet the tests laid out in the aforementioned Supreme Court precedents or results in a devaluation of greater than 33 percent and does not fall under the nuisance exception laid out in Section 204(d)(1). As I pointed out in my written statement before the Committee, this nuisance exception language in Section 204(d)(1) clearly mirrors that of the *Lucas* court's determination that "no compensation is owed—in this setting as with all takings claims—if the State's affirmative decree simply makes explicit what already inheres in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."

In the *Lucas* decision the Court recognized that "Regrettably the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." The court explicitly acknowledged that less-than total devaluations can be considered compensable takings. Viewed in this light, S. 605's 33 percent devaluation standard is less than revolutionary. It is merely Congress providing guidance to the Court as to when government regulation goes "too far" in impacting private property.

For the record, CEI would prefer to see a *de minimis* standard. Such a standard would apply the *Loretto* rule for physical occupations to regulatory takings. However, a 33 percent threshold is an improvement over the status quo, both because it provides a "bright line" test and because it will allow more landowners who should receive compensation to actually get it.

RESPONSES TO QUESTIONS FROM SENATOR RUSSELL D. FEINGOLD TO JONATHAN H. ADLER

Question 1. You testified, in response to a question from the Ranking Minority Member, Sen. Biden, that in the case of a change to government water delivery under a bureau of Reclamation contract, the government should be concerned about breaching that contract and a cause of action exists under contract law. I am interested then in your perspective on the purpose of two definitions of property contained in Title II, section 5: "the right to use and receive water" (Section 5B) and section 5E, which includes contracts.

If contract law is sufficient to protect water quantity and quality under agreements with the federal government, what is the purpose of including these definitions in S. 605? and what types of "takings" would the inclusions of such definitions protect against?

Do you believe that a federal government subsidy deserves private property protections? Will the federal government have the ability to reduce subsidies that raise property values without creating a cause of action under S. 605?

Answer 1. I am not an expert on the intricacies of water law. However, it is my understanding that under certain jurisdictions access to water has been recognized as a property right by both state and federal governments. The aim of including water rights in S. 605 should be to recognize and protect these property rights, but it should not be to protect any existing federal water subsidies. Section 203(5)(B) would protect these water rights. Thus, insofar as a rancher owns a water right on public lands (distinct from whether that rancher purchases grazing permits) this section would prevent the government from taking this right without paying com-

pensation. Section 203(5)(E) would ensure that the federal government recognize property rights, whether to water or something else, that are respected under state laws.

As to the larger point, federally-provided subsidies do not merit protections as private property rights. Moreover, CEI has long argued that federal subsidy programs, such as those for agriculture and natural resource use, should be discontinued. I do not believe that S. 605 will prevent the federal government from reducing farm payments or otherwise reducing or eliminating federal subsidies. If this were not the case, I would recommend that S. 605 be clarified so as to ensure that federal subsidies are not considered property rights that are protected from uncompensated regulatory takings.

Question 2. S. 605 as currently drafted does not make clear the intended relationship between Titles II and V. Title II contains broad definitions of property. Title V seems to confer a very distinct cause of action on certain property owners, namely those who are burdened by endangered species and certain wetlands restrictions.

Do you believe that all property owners, not solely those as defined in Title V, should have the ability to seek compensation for regulatory takings?

Answer 2. As I see it, the primary distinctions between Title II and Title V are as follows: Title II establishes a legal right to compensation that can be pursued in court or through the alternative dispute resolution process outlined in Title III. Title II seeks to codify existing Supreme Court precedents, amend the Tucker Act so as to remove existing barriers to the pursuit of redress, and clarify ambiguities in existing Supreme Court jurisprudence so as to provide a "bright line" test for regulatory takings.

Title V, on the other hand, simply sets up an administrative process through which landowners can seek compensation for regulatory takings that result from regulations promulgated under the Endangered Species Act and the Clean Water Act, as well as to provide additional administrative safeguards to prevent regulatory takings from occurring in the future under these laws.

All property owners should have the right to seek compensation for regulatory takings. The existence of Title V does not compromise this goal. Rather, it provides an additional course of action for victims of regulatory takings under particular laws, so that these landowners may receive compensation without having to file a lawsuit against the federal government.

Question 3. In *O'Neill v. United States*, the Ninth Circuit Court of Appeals held that the Bureau of Reclamation may make water delivery reductions of up to 50 percent to the Westlands Water District in California's Central Valley to preserve marine life consistent with the Endangered Species Act. The judges held that the contract "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortfall caused by statutory mandate." (95 Daily Journal D.A.K. 328).

Do you anticipate that should S. 605 become law, it would create a cause of action that such reductions would constitute a "taking?"

Answer 3. I do not anticipate that passage of S. 605 would make such reductions compensable "takings." I believe that courts would look at the provisions of the contracts in question, and so long as the federal government has observed the terms of the contractual arrangement into which it has entered.

RESPONSE TO QUESTION FROM SENATOR RUSSELL D. FEINGOLD TO RICHARD G. WILKINS

Question 1. In *O'Neill v. United States*, the Ninth Circuit Court of Appeals held that the Bureau of Reclamation may make water delivery reductions of up to 50 percent to the Westlands Water District in California's Central Valley to preserve marine life consistent with the Endangered Species Act. The judges held that the contract "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortfall caused by statutory mandate." 95 Daily Journal D.A.K. 328.

Do you anticipate that should S. 605 become law, it would create a cause of action that such reductions would constitute a "taking?"

Answer 1. The "property" interests conveyed by a contract are always subject to the express terms of the contract itself. If, as the Ninth Circuit concluded, the contract at issue here "unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortfall caused by statutory mandate," no "property" interest of the water purchaser has been invaded. In short, where a contract expressly reserves the regulatory power of

the federal government to reduce the amount of water provided under the contract, the water purchaser has no "property" right to demand an undiminished supply.

Such a result is hardly unusual. In context of bankruptcy, for example, the Supreme Court has held that, while "[p]roperty interests are created and defined by state law," Congress may if "some federal interest requires a different result," analyze differently the property interests of parties in bankruptcy from those of other parties. *Butner v. United States*, 440 U.S. 48, 54-55 (1979). Indeed "property" and "interests in property" are creatures of state law" only in the absence of "any controlling federal law." *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992), citing *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 370 (1945) ("In the absence of any controlling federal statute, a creditor or bona fide purchaser could acquire rights in the property transferred by the debtor, only by virtue of a state law"). Accordingly, and indeed *a fortiori*, a water purchaser cannot—by contract—obtain "property" rights greater than the express terms of the contract. Nothing in S. 605 changes this result.

RESPONSE TO QUESTION FROM SENATOR JOSEPH R. BIDEN, JR. TO RICHARD G. WILKINS

Question 1. Does Senate bill No. 605 create property rights that would not exist without the legislation?

Answer 1. No. The legislation merely defines the types of property rights that qualify for protection by reference to existing State and federal laws. The only arguable impact the bill has on the "creation" of property rights is the legislation's express reservation of the United States' authority to limit property rights created by Federal contract.

I. Property rights in general derive from, and are defined by, state law. In *Board of Regents v. Roth*, the Supreme Court established that "[p]roperty interest * * * are created and their dimensions are defined by existing rules or understandings that stem from [a source independent from the Constitution] such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. 564, 577 (1982). This analysis is well established. *E.g.*, *Lucas v. South Carolina Coastal*, 112 S. Ct. 2886, 2901 (1992) (noting the Court's "traditional resort" to the rule announced in *Roth*); *Delaware v. New York*, 113 S. Ct. 1550, 1557 (1993) (same).

In fact, the Court has emphasized that "[t]he hallmark of property * * * is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982), citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11-12 (1978); *Goss v. Lopez*, 419 U.S. 564, 573-574 (1975); *Roth*, 408 U.S. at 576-578. See also *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (stating that the definition of property "naturally suggests a reference to state-law concepts."); *Bishop v. Wood*, 426 U.S. 341, 344 (1976) ("A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of claims of entitlement must be decided by reference to state law. (footnote omitted)).

II. Nothing in Senate bill No. 605 alters the foregoing understanding that property rights are generally created by state law. Indeed, Section 203(5) of the legislation which defines the terms "private property" or "property," merely refers to a list of property interests created by state law and codifies the settled principle that the government can restrict the creation and enforcement of contractually defined property interests in appropriate circumstances. Section 203(5) of Senate bill No. 605 defines the term "private property" or "property" as used in the legislation. The section defines those terms as including:

all property protected under the fifth amendment to the Constitution of the United States, any applicable federal or State law, or this Act, and includes—

- (A) real property, whether vested or unvested, including—
 - (i) estates in fee, life estates, estates for years, or otherwise
 - (ii) inchoate interests in real property such as remainders and future interests;
 - (iii) personalty that is affixed to or appurtenant to real property;
 - (iv) easements;
 - (v) leaseholds;
 - (vi) recorded liens; and
 - (vii) contracts or other security interests in, or related to, real property;
- (B) the right to use water or the right to receive water, including any recorded lines on such water right;
- (C) rents, issues, and profits of land, including minerals, timber, fodder, crops, oil and gas, coal, or geothermal energy;

(D) property rights provided by, or memorialized in, a contract, except that such rights shall not be construed under this title to prevent the United States from prohibiting the formation of contracts deemed to harm the public welfare or to prevent the execution of contracts for—

- (I) national security reasons; or
- (ii) exigencies that present immediate or reasonably foreseeable threats or injuries to life or property;
- (E) any interest defined as property under State law; or
- (F) any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest.

This rather comprehensive definition although referring to property “protected under * * * this Act,” does not—of itself—create any independent federal property interests.

The property interests encompassed within the terms of Section 203(5) are established by reference to state, not federal, law. Interests in real property; water rights; rents, issues, and profits of land; and contract rights have historically been demarcated by state law. *See* Section I, above. Indeed, the final subsections of Section 203(5) make the legislation’s reference to state law pellucidly clear: property interests are those “defined as property under State law” or those interests “sufficiently well-grounded in law to back a claim of interest.” Section 203(5)(E), (F).

Indeed, the only arguable “federal” property interests “created” by Senate bill No. 605 would be potential property interests in federal contracts. But rather than expanding the property rights of parties who contract with the federal government, the legislation rather sharply curtails the legitimate expectations of those parties. Subsection (D) of Section 203(5) assures the federal government’s right to prohibit private parties from entering or executing contracts creating property rights which impinge national security concerns or threaten injury to another. This provision does not *create* any new property interests. Rather, it reserves to the United States the express authority to *limit* the property interests created by federal contracts. This is hardly an expansion of property rights.

ADDITIONAL SUBMISSIONS FOR THE RECORD

APRIL 6, 1995

PREPARED STATEMENT OF THE AMERICAN HOMEOWNERS FOUNDATION

The American Homeowners Foundation commends the Senate Judiciary Committee for addressing the challenging issue of property rights. The encroachment of otherwise desirable environmental laws and regulations on the constitutionally guaranteed right to private property has occurred gradually over many years. It has now reached the point where the conflict must be resolved by either amending the Constitution so as to reduce the level of property rights it originally guaranteed, modifying existing environmental laws and regulations so as to eliminate the conflict, or providing an equitable mechanism similar to eminent domain procedures so as to simultaneously protect the environment and private property rights.

For many American home and land owners the issue creates a dilemma. Many owners of environmentally sensitive real estate are current or former members of the environmental groups who deserve so much credit for awakening our country and Congress to the need to protect the environment. They have supported the environmental movement both financially and politically, and they remain committed to the need to protect environmentally sensitive real estate, whether it be owned by a middle class homeowner, a small farmer, or a major corporation.

However, many home and land owners have been taken aback by the impact of environmental regulations on property rights and by the economic impact of those regulations on property values. They are disappointed by the failure of most of the major environmental organizations to either support alternatives to mitigate the potentially severe economic impact on home and land owners of modest means, or to propose viable economic alternatives of their own. Many home and land owners have dropped their memberships in environmental organizations as a result. The feeling of many homeowners is that the zeal of environmental leaders towards protecting the environment is not matched to any degree with a sensitivity towards the potential economic plight they may create for many of their own supporters.

This lack of sensitivity is one of the reasons for the recent decline in public support for environmental groups. It explains the growing recognition by homeowners that in many respects the property rights views of small farmers, home builders, and other small land users, as well as large corporations involved in development, mining, timber, and agriculture, more nearly reflect their own.

We recommend that the committee support legislative alternatives which will provide financial compensation to home and property owners whose property values are diminished by environmental laws and regulations. We do not believe that wholesale repeal of environmental laws and regulations is necessary. We do not believe that our commitment to protect the environmental laws or regulations, these should be addressed on a case-by-case basis. We should preserve the national commitment to expanding the protection of the environment.

Contrary to those environmental groups who argue that fair treatment for landowners would be too expensive, we believe that it could be affordable. A new environmental coalition has even identified a source of funding. A "green Scissors" coalition of fiscally conservative public interest groups and environmental organizations recently formed and is calling for an end to \$33 billion in environmentally sensitive federal subsidies. Lead by Friends of the Earth and the National Taxpayers Union Foundation, their concept combines budget reduction and environmental protection. Both are supported by most homeowners. We urge this committee to support the concept with the additional modification that half of the total savings—\$16.5 billion—should be earmarked for the acquisition of land and/or development rights to environmentally sensitive land.

From a fiscal prospective the federal purchase of an appreciating and marketable asset like land would seem a far more desirable alternative than providing subsidies or purchasing rapidly depreciating assets like military hardware. We urge the members of the green Scissors coalition to support the redirection of half of the revenues saved through their proposal to this environmentally useful goal.

Such an approach would have the benefit of reducing the federal deficit, improving the environment, and eliminating the unfortunate and unnecessary tension between environmental groups and many of their loyal supporters. It would also impose discipline and prioritization to the process of land/land development rights acquisition. Under the current legislation and regulatory environment a single law or

regulation could devalue private real estate holdings of thousands of home and land owners by many millions of dollars with little discrimination. With a limited but growing budget, a plan to purchase land or the development rights to land would of necessity lead to a process under which the most environmentally sensitive land/development rights would be the first to be acquired, on a much more thoughtful, selective, case-by-case basis.

JULY 3, 1995

GREEN SPRING ENTERPRISES, INC.,
Salt Lake City, UT, July 10, 1995.

Senator ORRIN G. HATCH,
Chairman, Senate Judiciary Committee,
Dirksen Office Bldg.,
Washington DC.

DEAR SENATOR HATCH: I was privileged to have attended the hearing of the U. S. Senate Judiciary Committee on Monday, July 3, 1995, at the Utah State Capital Building. This meeting, wherein two panels submitted public testimony, was most uplifting to me, and I can endorse from personal knowledge the statements given by Mr. Larry Gardner, and that of Mr. Ronald W. Thompson, of the Washington County Water Conservancy District. Based on an invitation from you indicating that written statements could be received within 10 days of the July 3 hearing, this further statement is hereby forwarded.

My name is Robert B. Barker. My permanent residence is in Salt Lake City, Utah. I am associated with two companies, one named Green Spring Enterprises, Inc. that is a closely held family sub-chapter S corporation, and the other being Red Lands Co. L.C., the successor to an investing group of five individuals who purchased land in Washington County, Utah starting in 1964.

Shortly after 1964, our land holdings were annexed to Washington City. At that time, our land constituted approximately 375 acres. We have been active since that time in endeavoring to enhance the community of Washington City and establish tourist and destination facilities adjacent to the off-ramp #10 of the I-15 interstate highway. During this approximately 30 years, we have made some substantial contributions to the welfare of the community and the surrounding environs as it has grown from a small town of 411 people to a community of about 4,200 people.

The testimony given at the July 3 meeting indicated the ways in which overzealous representatives of the federal government have destroyed property values or have effectively taken from private individuals the rights pertaining to their property without appropriate compensation. We have been involved in several projects which further illustrate the manner in which the Clean Water Act and the Endangered Species Act have been administered in such a way as to either jeopardize or destroy the usage of private land. It is my desire to place on the record the history of the Green Spring Golf Course, a municipal golf course now owned by Washington City in the state of Utah.

During the 1980's, in endeavoring to enhance the attractability of Washington City, I found myself in the role of coordinator of an unofficial consortium of land owners and civic entities. The consortium was organized for the purpose of combining various tracts of land in such a way as to cause the creation of a municipal golf course using available water rights and utilizing a base of 40 acres of land which had been declared surplus by the Bureau of Land Management as a result of the demise of the "Dixie Project", a long-planned, but eventually abandoned water storage dam proposed by the Department of the Interior. The net result of the consortium's efforts was to contribute, in addition to the 40 acres of the BLM land, an additional 116 acres of private land together with a somewhat complicated land trade involving Washington City and the state of Utah. The private and city land involved in the consortium, which then consisted of Deseret Mutual Insurance Company; Red Lands Co., and the City of Washington in Utah, was valued by appraisal at approximately \$1,747,000. The contribution from our own company amounted to \$553,634. Washington City obtained financing by a municipal bond of \$4.3 million obtainable on the strength of the value of the unencumbered land which was donated to Washington City.

The process of feasibility studies, financing, planning and construction activity occurred during a period from late 1987 through November 1989, at which time the course was completed. During this period of time, there were many consultations with state, federal and private authorities recognized for their experience in projects of this type. Information obtained during that period included feasibility studies that stipulated there was no wetlands in this project. However, in spite of this experience, on May 12, 1989, with all of the construction having been completed, the bond in place and sold, and all of the course having been seeded except for the last two or three fairways, an agent of the Corps of Engineers appeared unexpectedly on the site, demanded the cessation of the project and declared that part of this area was wetlands. This declaration was accompanied with the threat of an immediately invocable fine of \$25,000 a day if any work continued, which was later raised to \$50,000 per day.

Because of the vested interests we then had in the project, and as a result of a natural inclination resulting from many years of professional architectural and engineering service, including World War II history as a member of the Corps of Engineers, I found myself cast in a role of responder to the obvious crisis in an endeavor to preserve the integrity of the project so firmly committed. This resulted in obtaining application blanks from the C.O.E. to see if this could be approved, even retroactively under the existing provisions of the Clean Water Act and the project could be completed as envisioned.

Having relied all of my professional life on the integrity of federal, state and local administrative agencies in the interpretation of codes and methods of conduct in the building process, I was greatly discomfited to find that the field representatives of the C.O.E. recommended to the city administration that they not make an application, but instead work out negotiations for mitigating the damage which the C.O.E. apparently regarded as an attempt at purposeful evasion of the law. From that period on, discussions were held under the threat of the imposition of huge fines and arbitrary definitions that persisted through the entire negotiating process.

Before the project was completed, all involved became "experts" upon wetlands law and departmental rulings and interpretations of both the C.O.E. and the EPA. In retrospect it became apparent that the base determination by the federal agencies was that the city was guilty of gross malfeasance and the only determination that ultimately needed to be made was whether the project was allowed to proceed at all, and if so, what would be the mitigation and the extent of the penalties required.

The education process thus required showed that upon careful review at each possible fork in the road the severest decisions seemed to be the choice. For example it now appears that an even handed review of the project as initially planned could clearly have resulted in eligibility for the granting of approval under the National Permit requirements without any other subsequent review. By the same token, the original jurisdiction for the management of this process could have been retained by the C.O.E. which allowed for more latitude at arriving at an agreed solution. Instead, in an inordinately hasty waiver of responsibility by the C.O.E. the primary jurisdiction was placed in the hands of the E.P.A. with the announced reason that the E.P.A. had "more clout" and could impose penalties within a 24 hour period.

Operating in this climate, after totally intimidating the Washington City Attorney, the subsequent activity involved the engagement of new environmental engineers, additional attorneys, transfer of the management process from Salt Lake City to Denver and protracted hearings, consultations, requirements for completely new exploration of alternate sites or solutions, such that the final conclusion required approximately an additional year before a "Removal, Restoration, and Mitigation Plan for Washington City Green Spring Golf Course" was able to be presented to the Environmental Protection Agency for their consideration.

The Green Spring Golf Course was allowed to open on November 4, 1989 on its original schedule, but under an enormous cloud of possible discontinuance, changed routings, imposition of fines and potential financial disaster. One of the key stipulations of the mitigation plan was the requirement for creating 7.5 acres of new wetlands over and above the maintenance of 4.62 acres of "defined" wetlands and the restoration of an additional 1.34 acres of wetlands within the perimeters of the golf course. Inasmuch as the city of Washington was physically unable to create this much wetlands within the area of the golf course, our firm voluntarily agreed to donate an additional adjacent 2.9 acres of land in such a location as to allow the 7.5 acre stipulation to be achieved. This donation was unilateral and was based on an appraised value of \$330,000.

It should be noted that as far as can be determined at the present date, the official "Removal Restoration and Mitigation Plan for Washington City", as prepared for the Environmental Protection Agency by Eckhof, Watson and Preator Engineer, submitted on June 15, 1990 which included monitoring requirements up through 1993, was never accepted in writing by either the C.O.E. or the E.P.A. However, a written status report from E.P.A. Region VIII dated December 19, 1994, as a follow up to an inter-agency inspection of August 13, 1994, required the continuation of additional monitoring for an additional five year period from the date of the letter.

Washington City has prepared a report dated July 10, 1995 addressed to your office in Salt Lake City outlining their cost experiences and additional cash outlays required for the processes outlined above. We refer you to that letter for an indication of the cash outlays required from Washington City of \$589,000. However, we have noted that not included in their costs was the E.P.A. fine of \$75,000, their monitoring costs over a period of five years of \$125,000 and an unaccounted for cost of mechanical pressurized irrigation to create wetlands by artificial means rather

than natural flow. The resultant total of \$754,000 plus the additional \$330,000 of land donated by us obviously means that this project was impacted by over \$1,084,000 or essentially a quarter of the initial amount of the 4.3 million dollar bond issue.

I am sure this is the kind of experience, where one or two entities are subjected to a tremendous burden in behalf of the greater good, that argues loudly for review of the current act and an oversight and control of those who are given the responsibility for administering it. We accordingly heartily endorse your efforts to enact the Omnibus Property Rights Act of 1995.

Senator Hatch attached is a magazine article from our file which you may find to be interesting reading regarding this subject of wetlands.

Very truly yours,

ROBERT B. BARKER,
Spring Enterprises, Inc.

If parts of your backyard are a bit soggy after a heavy rain, watch out! According to current EPA regulations, it's wetland and you better not disturb it.

The strange case of the glancing geese

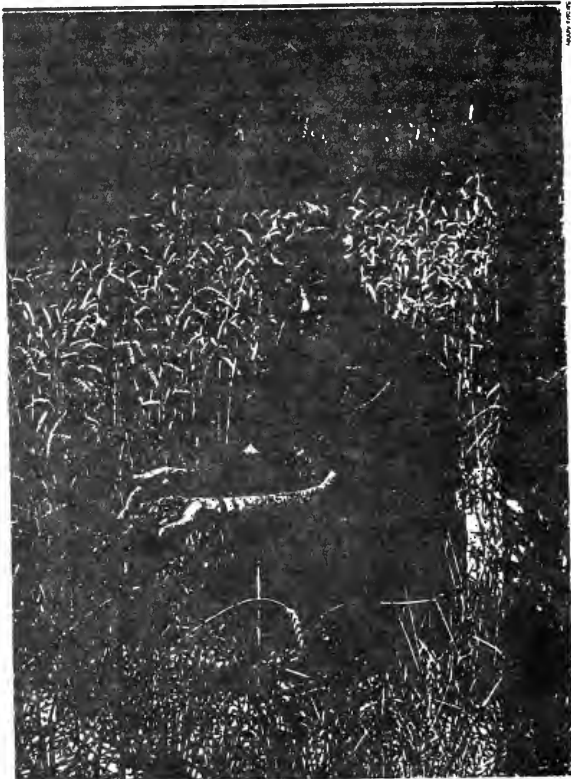
By Warren Brookes

IN EARLY AUGUST, amidst outcries from professional environmentalists, the Bush Administration moved to lift some of the more onerous property restrictions imposed by its own Environmental Protection Agency. Earlier, on June 12, property rights won another victory. After hours of acrimonious debate, the Senate voted 55 to 44 to tack on a very powerful amendment to a highway funding bill. Called the Private Property Rights Act, the amendment seeks to restore some of the sanctity of private property that has eroded in recent years in the U.S.

If the amendment passes in the House of Representatives as well, it will require the government to be a little less cavalier with its environmental regulations. When the authorities issue rules that damage property values, they must at least consider treating the rules as a "taking" under the Constitution. If a taking there is, the property owner would be compensated—just as he would be if the government took his land outright.

The conflict between private property rights and governmental power goes back a long way—as evidenced by the attention that the founding fathers paid to it. The writers of the Constitution declared in the Fifth Amendment that "private property [shall not] be taken for public use without just compensation."

For the first century this limitation on governmental power was the law, it wasn't the subject of much debate. If the government needed land for a garrison or a prison, it might compel an owner to sell, but the owner got paid. The only issue was how much.



Peggy Reagle of the Fairness to Land Owners Committee

"We will not accept government taking our land without just compensation."

Then, beginning around the turn of the century, battles over land-use controls landed in court. A landowner might be prohibited from putting up a slaughterhouse where he wanted, lest the smells and noise and blood offend neighbors and lessen their property values. Was such a restriction a taking of private property? In most cases, the courts said no. Your right to go into the fat-rendering business or erect a 20-story apartment building clashes with my right to clean air or sunlight. And so a zoning law that decrees where factories or tall buildings can go doesn't amount to a confiscation of private property, even though it might make some property owners poorer. If there was an erosion of property rights, few people objected. The restrictions were sensible and hardly onerous.

So it went in the courts—zoning laws were almost always upheld. But governments can go only so far with their restrictions, and California crossed the line. In a 1987 Supreme Court case, *Nollan v. California Coastal Zone Commission*, the Court ruled that the state's attempt to condition a building permit on a property owner's granting of access to a public beach was a taking and required com-

pensation. It was a turning point for a court system that had for a long time been much more protective of political liberties than of property rights. The justices said, in effect: If California wants more public beaches, it should buy the land it needs, not just take it.

The ancient controversy has taken a dramatic new turn with the rise of environmentalism in recent years. With wetlands rules and endangered species protection, the federal government is in the business of land-use control. So the old question again arises: When does regulation amount to confiscation? If your waterfront parcel is ecologically precious, can the government simply declare it unbuildable? Or must it appropriate the money to buy you out? If the government wants to preserve a species of owl, can it tell an owner of timberland that he can't touch the trees he owns? Or must it buy him out?

The Senate bill requires federal agencies to assess the regulations a second time before regulating a property to the point of uselessness. There is nothing antienvironmental in the bill. It puts no limits on environmental protection measures. But it does

impose a cost. It would simply require the government to compensate property owners for a significant loss they incur from environmental restrictions imposed upon their property.

Consider what happened in 1988 in Riverside County, Calif. The U.S. Fish & Wildlife Service declared the Stephen's kangaroo rat an endangered species. The result: Riverside County and local cities set aside 80,000 acres as wildlife preserves. Where the money would come from was not the Fish & Wildlife Service's problem. As then FWS Field Supervisor Nancy Kaufman told the *Washington Post*, "I'm not required by law to analyze the housing price aspect for the average Californian." If her enforcement helped deprive lower-income people of housing, that was no concern of hers. A local government agency financed the preserves with a fee of \$1,950 imposed on every acre developed in the county. Up went the price of housing.

But under the new Private Property Rights Act, bureaucrats like Kaufman will have to consider the cost. The proposed law codifies an executive order issued in 1988 by President Reagan. This order required every federal agency to assess in advance the



Dry county
84,000 acres of wetlands.



Wet county
The swamps grew to 259,000 acres.

Wetlands

impact of any regulation or sanction on property values, to determine whether that impact constitutes a taking under law, and to seek to avoid such impacts. The potential for substantial monetary impact was borne out by a series of recent court decisions. In the U.S. Claims Court in 1990 and 1991, Judge Loren Smith awarded \$64 million plus interest to property owners injured by such environmental sanctions.

The Senate bill has some professional environmentalists up in arms. If each of their efforts to protect "biodiversity" carries a price tag, the terms of the debate shift in ways they do not like. It will no longer be: Should we protect the spotted owl? It becomes: How much are we willing to spend to protect the spotted owl?

A setback for the environment? Not at all. If the Private Property Rights Act passes the House of Representatives, people will continue to look to the government to protect the environment. However, the bill will serve notice on the extreme environmentalists that Americans are not willing to give them a license to ignore property rights in the guise of protecting biodiversity.

When the final Senate vote was rallied, the environmental groups and their numerous representatives on the staffs of U.S. senators were lined up at the back of the Senate Chamber, visibly stunned at the suddenness and magnitude of their defeat. It was a complete reversal in just nine months of the defeat—by nine votes—of a similar provision.

It was a bitter pill for Senate Majority Leader George Mitchell (D-Me.), who wound up the debate with an impassioned cry that this bill, like Reagan's executive order, sought "to undermine regulatory protection by chilling agency action." But his motion to table the bill was shot down by 17 Democrats who teamed with 38 Republicans to hand environmental extremists the biggest legislative defeat in their history. The fact that 17 Democrats *did* vote for the Private Property Rights Act may demonstrate the rising political backlash against the extremes of the green lobby.

Ironically, this setback had its roots in what had looked like a major victory for the greens. In 1988 presiden-

tial candidate George Bush pledged "no net loss in wetlands." But on taking office, Bush faced the consequences of his statement. When the government enlarged the definition of "wetlands," Bush met angry protest from traditional Republican constituencies, farmers, businesses, real estate developers, landowners and local governments.

What caused the backlash was not the statement itself but an act of

marshes, bogs, swamps and lowlands for conversion to active farming and commercial and residential development. The EPA claims this has destroyed over half of all U.S. wetlands—or more than 100 million acres. But how to protect the wetlands? Reilly gave his answer long ago. As executive director of Laurance Rockefeller's Task Force on Land Use and Urban Growth, he helped write *The Use of Land: A Citizens' Policy*



EPA chief William Reilly

"Loss in land value is no justification for invalidating regulation of land use."

bureaucratic high-handedness apparently encouraged by Bush's pledge. This took the form of the 1989 *Federal Manual for Identifying and Delineating Jurisdictional Wetlands*, which extended federal jurisdiction over some 100 million additional acres of property, most of it privately owned. What outraged so many people was that most of the newly restricted land had only the remotest connection with water.

Why did the bureaucracy get so out of hand? When President Bush appointed William Reilly to head the Environmental Protection Agency, Bush confirmed the Washington adage that "personnel is policy." He had selected one of the most committed land-use planners in the environmental movement.

No question, there was and is a real need to arrest the long-term trend of draining and filling wetlands,

Guide to Urban Growth. It laid out many of the premises for using biological diversity as a rationale for limiting the two bêtes noires of environmentalism: single-family housing expansion and commercial agriculture. It noted that land use could be restricted at no cost to the government, through jurisdictional control.

Reilly's appointment as EPA administrator coincided with the early 1989 release of the new manual, which, in attempting to define "wetlands," extended the reach of the 1972 Clean Water Act. That manual asserted "jurisdiction" (requiring federal permits) well beyond traditional marshes and bogs. It extended it to cover *any* land with "hydric soils" or "hydrophytic vegetation." In plain English, that is land showing evidence of periodic saturation or containing plants, such as cattails, that are characteristic of wetlands. A third criterion defined

as "wetland" land where there is even a hint of water down to 18 inches below the ground for seven consecutive days of the growing season. Under the August proposal, some of those criteria were softened. Most important, the length of time a wetland must be saturated would be increased to 21 consecutive days of the growing season.

One of the areas hardest hit by the 1989 rules was Maryland's Dorches-

ter, C. Charles Jowaisas, a retired Columbia Pictures vice president, Peggy Reigle moved to Cambridge, in Dorchester County, to raise flowers and enjoy life. As a retirement investment the couple had bought a 138-acre abandoned farm that they planned to subdivide into 10-acre lots. Within months, however, Reigle was out of retirement and at war with the federal government.

Reigle's war started after she heard what the new definitions had done to an elderly neighbor. The neighbor had been informed that under the new rules, her property was classified as nontidal wetlands and therefore could not be developed. The neighbor had been counting on proceeds from land sales to build a new home.

In May 1990 Peggy Reigle wrote an angry letter to President Bush (one of thousands like it received by the White House). When local papers reprinted the letter, Reigle was besieged by calls from others like her, outraged by the new policy. She formed the Fairness to Land Owners Committee; in two weeks it signed up some 2,000 citizens and now boasts a membership of over 6,000 Marylanders and 2,500 from other states. Its credo: "We will not accept the government's taking our land without just compensation." The grass-roots backlash against federal wetlands imperialism was under way. And soon Congress was paying heed.

In January and February Representative John LaFalce (D-N.Y.), chairman of the House Small Business Committee, held hearings. Builders, realtors, national and local officials and developers shared stories about the quagmire of wetlands regulations. The town supervisor of Wheatfield, in Niagara County, N.Y., told LaFalce that if the Corps issued permits based on the 1989 manual, "areas like Niagara County will be deprived of approximately 65% of the remaining developmental property." David Brody, attorney for the Niagara Frontier Builders Association, said the manual's implementation, along with other problems, would result in "a 35% reduction in new home starts in Niagara and Erie counties in 1991." After the hearings LaFalce sent President Bush a letter "to alert [him] to the regulatory

travesty currently masquerading as federal wetlands policy."

In Hampton, Va., meanwhile, Thomas Nelson Community College had made a routine request for a Corps check of a proposed 40-acre site for its new sports complex. The result was a finding of "hydric soils" and "wetlands" at the college. Similar findings could, in a cascade of regulatory mayhem, threaten the 28-acre Nelson Farms subdivision, the 800-home, 133-acre Michael's Woods subdivision, the 300-acre Hampton Roads Center office park, and a 600-home Hampton Woods subdivision. As Hampton Mayor James Eason told the local *Daily Press*, "It's very scary. It's conceivable it could halt all development in the city of Hampton."

This quagmire trapped even some of the most obvious candidates for permits, such as Richard Adamski. This retired state trooper from Baltimore had invested \$16,000 in a building lot in the midst of a developed residential area in a hamlet in Dorchester County only to be told the 0.7-acre lot was "nontidal wetlands." Although he wanted to fill only an eighth of an acre to build a retirement home, the U.S. Fish & Wildlife Service recommended denial of his application.

Eventually the Corps did issue a permit to fill the sliver of land, but only if "the permittee shall mitigate at a 2:1 ratio for wetlands losses by constructing 0.25 acres of wooded nontidal wetlands." In other words, Adamski had to find someone willing to sell him a permanent "conservation" on twice as much land. No takers yet; Adamski remains in limbo. Yet when I walked through the wettest of these mostly wooded "wetlands" last April (the wettest season), my dress shoes emerged pristinely unmoiled.

As the outrage over his high-handed policies mounted, Reigle had to beat a strategic retreat. On Mar. 7 he admitted to the prestigious American Farmland Trust: "We suddenly found ourselves in the center of a maelstrom. Everywhere I traveled I heard a local wetlands horror story—not just from farmers, but from developers and respected political leaders." He suggested that the entire process had gotten out of hand.



The 1989 manual
Bureaucratic swamp?

ter County (see map, p. 105). Previously some 275,000 acres of privately owned land in Maryland had been classified as wetland. With the 1989 manual, the figure topped 1 million acres. This meant that the government suddenly sanctioned 740,000 additional acres against filling or other disturbance, unless specifically permitted by the Army Corps of Engineers, with the EPA and FWS exercising virtual veto power. Under the new proposal, the amount of wetlands would still increase, but by less than the 740,000 acres. The 1989 manual, however, remains the law of the land. The revisions would be unlikely to go into effect before early 1992. The permitting process itself remains a bureaucratic swamp.

This outraged Margaret Ann Reigle, who had retired from her job as vice president of finance at New York's *Daily News*. With her hus-

Wetlands

But tell that to William Ellen, a successful and respected Virginia marine engineer who is now appealing a prison term and a large fine for having "filled" more than 15 acres of Eastern Shore "nontidal wetlands" when he bulldozed these seemingly dry and forested acres to create large nesting ponds for ducks and geese as well as a management complex.

Ellen was working on a project for Paul Tudor Jones II, the high-flying futures trader (see p. 184) who in August 1987 had bought 3,200 acres in Dorchester County, very close to the Blackwater Wildlife Refuge. Jones' idea was to create a combination hunting and conservation preserve as well as a showplace estate. The centerpiece of the project is a 103-acre wildlife sanctuary developed with the assistance of the Maryland Department of Natural Resources. This sanctuary includes ponds, shrub swamps, food plants and grassland plots all designed to attract geese, ducks and other migrating waterfowl.

In May 1990 Jones suddenly pleaded guilty to one misdemeanor related to negligent filling of wetlands, agreeing to pay \$1 million to the National Fish & Wildlife Foundation to help the Blackwater Refuge, plus a \$1 million fine. The plea allowed Jones to avoid a costly and debilitating trial, and possibly even a jail term and the loss of his trading license. However, no such deal was afforded Bill Ellen, himself a well-known conservationist who, with his wife, runs a rescue/rehab mission for injured wildlife and waterfowl.

How could Ellen be prosecuted for converting land that was so dry water-spraying had to be used as a dust suppressant during bulldozing into large nesting ponds for waterfowl? That question disturbed trial judge Frederic Smalkin at the U.S. District Court in Baltimore, and the answer he got was bizarre.

Prosecution witness Charles Rhodes, one of the EPA's top scientists on wetlands, said that even though the forested "wetlands" had been replaced by new ponds, the ecology was supposedly worse off.

Why? The problem was bird shit. "The sanctuary pond is designed to have a large concentration of waterfowl, and before the restoration plan



Conservationist Bill Ellen

Gilty as charged: too many goose droppings.

was implemented, all that fecal material [from the ducks and geese] was geared to be discharged right into the wetlands, whereas now it is actually designed to go through like a treatment system through the wetlands. So that would have been a negative impact, a water quality impact." In other words, the bird droppings, instead of staying in one place, would be spread over a wider area.

To which Judge Smalkin responded incredulously: "Are you saying that there is pollution from ducks, from having waterfowl on a pond, that that pollutes the water?" Incredibly, a jury convicted Ellen on five counts of filling wetlands. But U.S. Attorney Breckinridge Willcox said Ellen's conviction sends "a clear message that environmental criminals will, in fact, go to jail." The prosecution asked the court for a prison term

of 27 to 33 months, but Judge Smalkin sentenced Bill Ellen to six months in jail and four months of home detention.

These examples of federal wetlands policy as practiced in the early years of the Bush Administration are a case of a bureaucracy run amok. In fact, there is little law today that provides due-process federal jurisdiction over wetlands. There is only the Food Security Act of 1985, which asserts jurisdiction over those farmlands under federal subsidy programs. But farmers may remove that jurisdiction by taking their land out of the programs.

Otherwise, the wetlands program is very largely a contrivance of federal bureaucrats, sometimes working with friendly courts to expand Section 404 of the Clean Water Act. Yet this act makes no mention of "wetlands" and is designed to regulate only direct



"to regulate commerce... among the several states." To assert this power on isolated and local wetlands, the EPA and the Army Corps of Engineers engaged in such creative flights of fancy as declaring ducks and geese "interstate waterfowl." This led to what some call the "glancing goose test," which determines that an area is a wetland if an interstate goose pauses to consider it.

In a brutal display of naked power, the EPA and the Department of the Army plunged ahead in December in their "Wetlands Enforcement Initiative," designed to bring 24 high-visibility defendants like Paul Tudor Jones to justice. The Dec. 12, 1990 memorandum asked all regional administrators to produce a "cluster" of new cases to be announced in an April "first 'wave' of publicity... to provide an early deterrent to potential violations which might otherwise occur during the 1991 spring and summer construction season."

But on Apr. 19 a high-visibility case blew up in the government's face. James Allen and Mary Ann Moseley, Missouri farmers, had built a perimeter levee to keep their Mississippi Basin farm from flooding. The government declared the area to be wetlands of the United States, sued the Moseleys for violations of the Clean Water Act and sought fines of \$25,000 a day for as long as the violation was in effect.

But the Moseleys are members of the American Agriculture Movement, a progressive farm organization that has joined the mainstream farm groups in opposing the extension of the definition of "wetlands" and supporting the Private Property Rights Act. AAM's Fayetteville, Ark. lawyer, John Arens, has a record of beating the government in court—and he did it again.

When Arens was not allowed to bring in his own "expert witnesses," he minced up the government "experts" by demonstrating the capricious nature of the so-called wetlands law. He asked one EPA expert if it were not true that, were he to play baseball on a diamond built on hydric soils and went into the batter's box and scuffed his cleats, and then knocked the resulting dirt off them, back onto the field, he would be in technical viola-

tion of the Clean Water Act?

"When he [the so-called expert] was forced to answer yes, I looked at the jury and I knew we were on our way!" Arens said. "But what really convinced the jury the government had no case was when it discovered that the government prosecutors had no law!"

"While the jury was deliberating, they kept sending out to the judge for copies of the 'wetlands law.' When the judge sent them federal regulations, they sent back and asked for the law. When the judge sent them the Clean Water Act, and said this was all the law he had to give them, they [the jury] decided the government had no case because it had no jurisdiction."

More setbacks awaited the power-grabbing bureaucrats. In January 1989 then Assistant U.S. Attorney General Stephen Markman had a memorandum prepared on a big wetlands case the Justice Department was prosecuting. The memorandum demonstrated, with dozens of citations, the flimsiness of the government's wetlands policies, concluding: "The Corps and the EPA appear to have circumvented the Constitution's requirements... and the federal district and circuit courts have not corrected them." The courts have apparently been paying attention.

And so the battle has been joined. On the one hand are the wildlife-at-any-price people. On the other, people who think that environmental policy ought not override property rights.

The environmental extremists have made their intentions clear. In 1975 poet Gary Snyder won the Pulitzer Prize for his radical call for an "ultimate democracy [in which] plants and animals are also people." He wrote that they should "be given a place and a voice in the political discussions of the humans.... What we must find a way to do... is incorporate the other people... into the councils of government."

A few years later, in 1980, a leading ecologist, Joseph Petulla, said, "The Marine Mammal Protection Act [and] the Endangered Species Act [embody] the legal idea that a listed nonhuman resident of the U.S. is guaranteed, in a special sense, life and liberty."

dumping into and pollution of the nation's "navigable waters," rivers, harbors, canals, etc.

In a 1975 decision (*Natural Resources Defense Council v. Callaway*), a Washington, D.C. district judge ruled that federal jurisdiction applied beyond navigable waters to any wetlands that might remotely feed into such rivers and harbors. But even that did not cover "isolated wetlands" with no connection to "navigable waters"—like the puddles in your backyard after a heavy rain. Nevertheless, since 1975, jurisdiction has been expanded entirely by fiat and court interpretation to cover that definition in the EPA manual—water 18 inches down.

The fig leaf for this judicial and executive imperialism is Article I, Section 8, paragraph 3, of the Constitution, which gives Congress the right

Wetlands



Road-widening project on Johnny Mercer Boulevard near Savannah, Ga. The highway crew had to fill 4.2 acres of wetlands. In "mitigation" of the damage, the federal government demanded that Georgia dig up a pristine forest nearby and turn it into a swamp.

Of course, the Constitution says nothing about the rights of trees, snakes, owls and fish. Which may be why, back in 1973, Reilly's task force essentially called for the repeal of the takings clause of the Fifth Amendment: "Many [judicial] precedents are anachronistic now that land is coming to be regarded as a basic natural resource to be protected and conserved. . . . It is time that the U.S. Supreme Court re-examine its precedents that seem to require a balancing of public benefit against land value loss . . . and declare that, when the protection of natural, cultural or aesthetic resources or the assurance of orderly development are involved, a mere loss in land value is no justification for invalidating the regulation of land use [italics added]."

"A mere loss in land value . . ." In that "mere" resides a philosophy that questions the values of private property and individual freedom. But after years of having things pretty much their own way, people who think like Reilly are getting a real fight.

Idaho Republican Steve Symms, who leads the fight in the Senate for

the protection of property rights, says: "We should adopt a policy of no net loss of private property." Since the federal government already owns some 40% of U.S. land, Symms argues that it ought to be willing to swap some of its 730 million acres in order to obtain privately owned land that is environmentally sensitive. If, say, the National Park Service wants 50,000 acres to provide more protection for Shenandoah National Park, it can ask the Forest Service or Bureau of Land Management to sell to private citizens a like amount to finance the acquisition. Such a policy of no net gain in federal lands was introduced this summer in the House in legislation drafted by Representative Bill Brewster, Democrat from Oklahoma.

Do we really want the federal government owning even more of the country, whether through outright purchase or through limitations on land use? Free-market environmentalists like R.J. Smith of the Cato Institute argue that more government ownership and control would actually harm the environment. He

says: "Ecological devastation . . . invariably accompanies too much government ownership of land. You don't have to look just to Eastern Europe for confirmation. You need only examine the condition of most of the Bureau of Land Management inventory of properties, or remember what the Park Service allowed to happen at Yellowstone."

But the zealots won't give up. On Oct. 1 the EPA's regional office in Chicago awarded a grant of \$50,000 over three years to the Sierra Club's local "Swamp Squad," which amounts to an unofficial policing of the environment. These vigilantes spy on developers and other land and property owners to report potential wetland violations. The EPA press release quoted Dale Bryson, the regional director of its water division: "This grant will allow them to continue their valuable work in a more vigorous way."

The Senate has served notice that it thinks some of this "valuable work" has already gone too far. By all the evidence, many of the American people would agree.

JUNE 29, 1995.

Hon. ORRIN HATCH,
U.S. Senate,
Federal Building,
Salt Lake City, UT.

Attn: Kathleen

Re: Comments on the Omnibus Property Rights Act

Thank you for the opportunity to comment on this proposed legislation. I have been extensively involved in assisting irrigation districts on Bureau of Reclamation projects for the past 15 years having worked with 26 irrigation agencies in Utah, Washington, Idaho, Nevada, California, New Mexico, Wyoming, Montana, Nebraska, Kansas and Texas. In this work, I have researched the original Reclamation Act of 1902 and subsequent supplementary acts along with Congressional reports and applicable court decisions with regard to the land, property and contractual rights of the water users. My findings are that the United States contracted to sell water rights to the water users on Reclamation projects. Sections 5 and 8 of the Reclamation Act of 1902 refer to the "sale" of water and state that water rights are "acquired" by the water users.

All subsequent acts such as the Acts of August 9, 1912, August 26, 1912; August 5, 1914; January 25, 1917, May 15, 1922; May 25, 1926; August 9, 1939; July 2, 1956; June 21, 1963; and Reclamation Reform Act of 1982 either specifically recognize or otherwise *preserve the principle of sale of water to the water users*. In addition, Supreme Court decisions such as *Ickes v. Fox et. al. (1936)* and *Nebraska v. Wyoming (1944)* state that the United States is not the owner of the water, but that the water is owned by the water users. Specific language for *Nebraska v. Wyoming (1945)* reads (*italic type for emphasis only*):

* * * The appropriations [of water] under state law were made to the individual landowners pursuant to the procedure which Congress provided in the Reclamation Act. *The rights so acquired are as definite and complete as if they were obtained by direct cession from the federal government.* Thus even if we assume that the United States owned the unappropriated rights, they were acquired by the landowners in the precise manner contemplated by Congress * * *

My review of the proposed Omnibus Property Rights Act triggered a review of just recently proposed rules published in the Federal Register Vol. 60, No. 63, April 3, 1995, Department of the Interior, Bureau of Reclamation, 43 CFR Parts 426 and 427, entitled "Acreage Limitation and Water Conservation Rules and Regulations". The agency's analysis of takings (page 16940) is entirely inadequate, erroneous, and misleading with regard to the rights of water users. The published analysis states (*italic type for emphasis only*):

* * * Because districts and individual water users hold only contractual rights *to services provided by Reclamation* and the proposed rule would have only a de minimus impact on the value of any Constitutionally protected property right *if such right exists*, it has been determined that this proposed rule does not present a significant taking.

This statement indicates that the contractual rights of the water users are only in relation to *services provided by Reclamation*. The analysis fails to recognize the property rights of water users on over 40 million acre-feet of water in the West and summarily "takes" this water as federal property through the rules and regulations process. The value of this water is staggering (on the order of several trillion dollars) and the implications of the above statement are astounding. They are in direct conflict with existing law and contracts. This example shows that the Omnibus Property Rights Act is badly needed. Federal officials must be made to recognize and protect the property and contract rights of the people.

I have also reviewed the comment letters of Steven L. Hernandez and Ronald K. Christensen transmitted to your office and fully concur with and recommend their comments. I appreciate and support your efforts in the passage of this bill.

Sincerely,

HARVEY L. HUTCHINSON, P.E., R.C.E.

STEVEN L. HERNANDEZ,
ATTORNEY AT LAW,
Las Cruces, NM, June 28, 1995.

Senator ORRIN G. HATCH,
Attn: Kathleen

Thank you for the opportunity to comment on this legislation. Our office represents numerous irrigation districts formed under Reclamation Law in New Mexico, Idaho, California, Nebraska, Washington, Montana and Nevada. We are also involved in several stream adjudications involving the United States Bureau of Reclamation (Bureau) and their claims to water rights. Not the least of many of my clients problems has been the effect of the Endangered Species Act on the operation of these irrigation projects and their delivery of water to constituents.

My comments come from the point of view of an irrigation district formed under Reclamation Law and how this legislation would affect them. Keep in mind that in many states, the water right for the project is held in the name of the United States and the United States has been reluctant to agree that they are not the owners of the water rights.

In fact, after the *Madera* case in California, the Bureau has taken the aggressive position that water users only have a contingent contract right to receive water and that the Bureau can reallocate project water for other uses such as fish and wildlife and wetlands without compensation as part of water delivery contract renegotiations. In other instances, the Bureau is claiming that it will take an act of congress to convey a water right to a district that has repaid all of its construction costs to the United States because there must be specific legislation to convey any property owned by the United States.

Since many of the reclamation projects throughout the west have not had the project water right adjudicated, the Bureau is free to claim that their actions involving project water do not amount to taking, therefore, this legislation must be flexible enough to cover the many situations that these irrigation districts face throughout the west.

As part of an effort to find water for the ESA and wetlands, the Bureau has also proposed project water conservation regulations to take water away from existing uses by dangling "discretionary funds" in the face of many districts that had relied on miscellaneous revenues for operation and maintenance purposes. Similarly, the United States has insisted on storage rights in projects in Idaho in order to meet flow requirements for Salmon. With this background, I offer the following suggestions.

SECTION 203

If "private property" is intended to include "the right to use and receive water", wouldn't it be clearer if the language were "the right to appropriate, use, and receive water under federal or state law, or based upon contract."

It bothers me that the definition of private property is so broad. For example, aren't users of project water under Warren Act contracts "private property" owners under the definition even though under their contracts and the law, there is clearly no property or ownership?

SECTION 204 AND SECTION 502

In the part of these sections that states that "private property has been physically taken for public use", isn't this universe condemnation under the Fifth Amendment's takings clause already? Why is it here in this bill if "taking" under this new bill does not include condemnation?

In the part of these sections that states "and any other circumstances * * *", there is a fundamental difference between the words "and" versus "or". Under statutory construction using "or" means that you get compensation for any of the categories named. Using "and" means that all the categories listed must be applicable before the property owners get compensation.

I am unclear as to what "its action substantially advances the state's purpose" means. Is this a defense which may be raised by the United States against the property owner? Should this be "government's purpose"? If so, a definition of "government" would be helpful, because it would clarify that any claim brought against the "government" would be only against the United States, federal agencies and instrumentalities etc. Instead of the state irrigation district that also deals with project water.

SECTION 404

In that part of this section where "An agency shall not issue rules that *require* uncompensated takings", isn't this the intent of the entire bill? in other words, isn't the purpose of the bill to protect against indirect/regulatory takings? The word "require" sounds like there has to be express language in the rule to this effect. Wouldn't a better choice of words be "that result in uncompensation takings"?

SECTION 508

The "statute of limitations" says the owner has 90 days to file a claim "after final agency action". This language is troublesome because we do not know what is "final agency action." Where does the property owner file his claim? With the offending agency? Is this a notice of claim provision to the agency or a statute of limitations? Section 406 says you have six years to file a lawsuit. This section appears to be an administrative procedure section to file with the agency first, before you can file a lawsuit (exhaustion of administrative remedies). It's not really clear that this is the intent. In addition, isn't the binding arbitration section in conflict with Section 301?

I know that this is a very quick review of the legislation, but I hope it helps and please do not hesitate to contact me if you have any questions.

JUNE 28, 1995.

Hon. ORRIN HATCH,
Attn: Kathleen

Re: Comments on the Omnibus Property Rights Act

Thank you for the opportunity to comment on this proposed legislation. It is badly needed and I would like to commend Senator Hatch and all those who have and will contribute to the drafting and passage of this bill. The right to property is fundamental to our liberty and must be protected to ensure our continued freedom. Government intrusion on property rights is eroding our rights and our freedom. This bill will do much toward correcting this problem. I have several suggestions and concerns that I believe should be considered.

So you will understand my concerns and my perspective, I work for a large international engineering consulting firm as a water engineer and have been working in the water resources field for many years. I have had much experience with Bureau of Reclamation projects throughout the West and am currently working on a doctoral dissertation dealing with the rights and interests of water users in these projects. I am finding, both in my work as a private consultant and in my research, that the rights of water users on Reclamation projects are in many cases, being disregarded and ignored by Reclamation officials. The property rights of the water users appears to be one of the least of the concerns of many of these officials.

For example, when the manager of the Midvale Irrigation District complained of how new rules and regulations were diminishing the rights held by the water users for many years on the Riverton Project in Wyoming and that it was difficult to determine how to manage the project and respond to Reclamation's requirements, the Reclamation official responded that it was rather simple. All you need to remember is one word: "compliance". That is quite a response from a federal official in the land of the free! Obviously, there must be a greater incentive and requirement for federal officials to respect the property rights of private citizens.

I will first make specific comments on the language of the various sections of the Act and then will offer a suggestion for addressing an additional very important property right concern with regard to the recent use of the public trust doctrine by the courts in both water and land law.

SECTION 203

In defining property, I would suggest that wording "the right to use and receive water" be expanded to read "the right to appropriate, use and receive water under federal or state law, or based upon contract". I think this would be more definitive and inclusive of water rights on Reclamation projects.

SECTION 403

I suggest that the taking impact analysis include a requirement for disclosure of potential disputes and claims by property right holders including disclosure of the opposing arguments raised by the property rights holders, an objective analysis of these arguments and the potential legal costs of the government in defending the

taking. If unsuccessful, the cost of the defense should be borne by the agency in its current budget.

Also the exemption of trust properties from the TIA is troubling. The Supreme Court decision, *Nebraska v. Wyoming* (1945) as quoted later below indicates that Reclamation is a "trustee" and "carrier" for the water users. Not being a lawyer, I find a concern for what this might mean in terms property rights for Reclamation project water users. Could Reclamation use the trust exemption to avoid a TIA on Reclamation projects?

SECTION 404

I applaud this section. An example of an agency's disregard of property rights and one that will result in uncompensated takings is published in the Federal Register Vol. 60, no. 63, April 3, 1995, Department of the Interior, Bureau of Reclamation, 43 CFR Parts 426 and 427, entitled "Acreage Limitation and Water Conservation Rules and Regulations". The agency's analysis of takings as reviewed under Executive Order 12630 (page 16940) is entirely inadequate, erroneous and misleading. The published analysis states (*italic type for emphasis only*):

* * Because districts and individual water users hold only contractual rights to *services provided by Reclamation* and the proposed rule would have only a de minimus impact on the value of any Constitutionally protected property right if such right exists, it has been determined that this proposed rule does not present a significant taking."

This statement indicates that the contractual rights of the water users are only in relation to *services provided by Reclamation*. This cannot be farther from the truth. The contractual rights of the water users are *rights to the purchase the water rights* under Reclamation and state law. The water rights are the rights to the use of the water sold by the United States for the purchase price of the cost of construction of irrigation works. To defend these statements with regard to purchase and sale of water, I quote sections 5 and 8 of the Reclamation Act of 1902.

Sec. 5. [Reclamation requirements for entrymen—No water for more than 160 acres of private lands in one ownership—Residence of landowner—Receipts to reclamation fund.]—The entryman upon lands to be irrigated by such works shall * * * pay to the Government the charges apportioned against such tract * * * *No right to the use of the water for land in private ownership shall be sold for a tract exceeding 160 acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made.* All moneys received from the above sources shall be paid into the reclamation fund * * *

The effect this section along with sections 3 and 4 not quoted here appears to have been to authorize the Secretary to construct irrigation works and *sell water* to both public lands entered and settled under the homestead laws and to lands already in private ownership subject to the terms and conditions of the Act. For both public lands entered under the homestead laws and for private lands, it appears that *the right to the use of the water was sold to the landowner and was to be permanently attached to the land title as a right of the land to receive water. It appears to have been a sale of water.* The price of sale appears to have been the proportionate cost of the construction of the works required to provide the water. Thus, the right to the use of the water appears to be as much of a property right as that of the land itself. It appears that the patent (or title) to the land was to include the right to the use of the water on the land. The Act of August 9, 1912 modified these provisions somewhat providing for the issuance of a water right certificate in lieu of including the water right in the patent for the land. However, the fundamental intent of sale and purchase of the water right was preserved with the provision of the water right certificate. The water right certificate was required to specify that the water was appurtenant to the land.

Section 8 of the Reclamation Act addresses the assignment of water rights and the conformance to state law. It reads as follows (*italic type added for emphasis only*):

Sec. 8. [Irrigation laws of States and Territories not affected—Interstate Streams—Water Rights.]—Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and

the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.* (32 Stat. 390; 43 U.S.C. 372, 383)

The last portion of this law states that the *right to the use of project water is acquired* by the landowner and it is *appurtenant, or directly connected, to the land irrigated*. The House and Senate Reports for the Reclamation Act of June 17, 1902 confirm this interpretation. An excerpt from the House Report reads (House of Representatives Report No. 1468, 57th Congress, 1st Session) (italic type for emphasis only):

* * * Section 8 recognizes State control over waters of non-navigable streams such as are used in irrigation and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to such laws. It also provides that nothing in the act shall be held as changing the rule of priorities on interstate streams. In order that the *water rights acquired* under the provisions of the act shall be of the character most approved by centuries of irrigation practice, and such as will *absolutely insure the user in his right and prevent the possibility of speculative use of water rights*, the character of the right which is contemplated under the act is clearly defined to be that of *appurtenance or inseparability* from the lands irrigated and founded on and *limited by beneficial use*. Under this section uniformity of record of the rights is secured and the rules of priorities of rights are not disturbed, while the cost of maintaining the administrative machinery of water distribution is placed on users and the States; *the Government is free from all expense or responsibility when projects are completed and paid for.*

The above discussion indicates that the principles of state water law were to govern the water rights and that the water rights *would be acquired* by the landowners. The character of the water rights were to *absolutely insure the user in his right*. The water right was made appurtenant to the land to prevent speculation. *This would appear to include both private speculation and speculation by the Federal government.* The appurtenance to the land appears to make the water right a property right of the land. The rights are also founded on beneficial use. It is the water users on Reclamation projects that have put the water to beneficial use; not the United States. Thus, the rights appear to belong to the water users as long as they pay their annual construction, operation and maintenance obligations and use the water beneficially. In addition, the Government is to be "free from all expense or responsibility when projects are completed and paid for." This does not square with Reclamation's claim that water users have only contracted for services from Reclamation.

In *Ickes v. Fox et. al.*, the Federal Court of Appeals (later affirmed by the U.S. Supreme Court), concluded with respect to water rights on Federal projects the following (italic type added for emphasis only):

Appropriation was made *not for the use of the government*, but, under the Reclamation Act, *for the use of the land owners*; and by the terms of the law and of the contract already referred to, *the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works.* Compare *Murphy v. Kerr*, 296 Fed. 536, 544, 545. *The government was and remained simply a carrier and distributor of the water (ibid.), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.* As security therefor, it was provided that the government should have a lien upon the lands *and the water-rights appurtenant thereto*—a provision which in itself imports that *the water-rights belong to another than the lienor, that is to say, to the land owner.*

This court decision indicates that the water belongs to the land owner. The importance of the above court case is discussed by the U.S. Supreme Court in *Nebraska v. Wyoming* (1945). The court cites the above paragraph and adds the following (italic type added for emphasis only):

Individual water users contracted with the United States for the use of project water. These contracts were later assumed by the irrigation dis-

tricts. Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted that proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual landowners.

All of these steps make plain that those projects were designed, constructed and completed according to the pattern of state law as provided in the *Reclamation Act*. We can say here what was said in *Ickes v. Fox*, supra, pp. 94-94:

The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator. *The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.*

Pursuant to that procedure individual landowners have become the appropriators of the water rights, the United States being the storer and the carrier.

The appropriations under state law were made to the individual landowners pursuant to the procedure which Congress provided in the *Reclamation Act*. *The rights so acquired are as definite and complete as if they were obtained by direct cession from the federal government. Thus even if we assume that the United States owned the unappropriated rights, they were acquired by the landowners in the precise manner contemplated by Congress.*

The rights of the United States in respect to the storage of water are recognized. So are the water rights of the landowners. *To allocate those water rights to the United States would be to disregard the rights of the landowners.*

Thus, under this decision the water rights appear to belong to the individual landowners under constraint of beneficial use, contractual agreements, and appropriation in accordance with the *Reclamation Act* and State Law. They do not belong to the Federal government. *It hardly appears that the water users have contracted only for the services of Reclamation as claimed by Reclamation's analysis of the potential takings of its proposed rules.* Section 404 should help, prevent such erroneous analyses. Requirement of disclosure of the opposing views of property right holders and an objective analysis of these views in the TIA should also help.

SECTION 508

The "statute of limitations" says the owner has 90 days to file a claim "after final agency action". What is final agency action? Where is the claim filed? Section 406 says a person has six years to file a lawsuit. How does this relate to the 90 days? The two sections appear in conflict. A clearer wording with regard to procedures for filing a claim and/or lawsuit appears needed.

Public trust doctrine

The promotion and subsequent use of the public trust doctrine in water and land property law has become a grave concern. The public trust doctrine would completely circumvent property rights guaranteed by the Constitution by claiming a prior public reserved right to regulate and control all land and water under the so-called "police power" to promote commerce and the general welfare. Those promoting this doctrine generally claim that we reside in a "regulatory state" and completely ignore the right of property guaranteed under the Constitution. Their logic would allow uncompensated "takings" of private property by stating that since a prior right was reserved in all land and water for the public trust, exercise of this prior public trust right does not constitute a taking. They have become influential and lower courts have begun using this doctrine in decisions. Language should be added to this bill that would dispel and address this myth of prior reserved public trust rights in land and water. The following language should hopefully make a good start in this regard:

All land patents and water-right certificates heretofore or hereafter issued by the United States are hereby validated and declared to convey or have conveyed all right, title and interest of the United States in behalf of the states to the patent or water-right certificate holder without reservation except as otherwise specifically provided in such patent or water right certificate and subject to those powers specifically provided to the United States under the Constitution.

It appears prudent that the public trust doctrine should be addressed while such important legislation as the Omnibus Property Rights Act is being considered. To do otherwise will leave a cloud upon property rights in that courts will remain free to invoke this doctrine in making property rights decisions. Property rights will re-

main uncertain and subject to infringement under the use of the public trust doctrine unless addressed by legislation clarifying the rights conveyed in land patents and water-right certificates.

Again, thank you very much for the opportunity of commenting on this legislation. I wish you well in the successful passage of this bill.

Sincerely,

RONALD K. CHRISTENSEN, P.E.,
American Fork, UT.

NATIONAL AUDUBON SOCIETY,
Salt Lake City, UT, July 10, 1995.

Senator ORRIN G. HATCH,
Senate Judiciary Committee,
Dirksen Office Building,
Washington, DC.

DEAR SENATOR HATCH: These comments are intended to be part of the written record for the public hearing on Private Property Rights conducted at the State Capitol in Salt Lake City, Utah on July 3, 1995.

I appreciate the opportunity to comment on private property rights. Many of the comments will relate to wetlands. The interconnection between these two is particularly important to me since I have worked as Utah Wetlands Coordinator for National Audubon Society for the last four years. Also, "private landowners own more than 75 percent of the remaining wetlands in the lower 48 states (#1 Below.)"

There are five documents/articles that I have attached to, and are referenced throughout, this testimony. They are:

1. "The Key to Protection: Private Lands," by Gene Whitaker in *National Wetlands Newsletter*, dated March-April 1995.
2. "The problem: Loss of Utah's Valuable wetlands." draft dated July 11, 1991, prepared by myself from two U.S. Fish and Wildlife Service documents.
3. "The Takings Issue" and "Protecting America's Wetlands" in the *National Audubon Society 1995 Congressional Guide*, April 1995.
4. "Wetlands and the Constitutional Balance," by LaJuana S. Wilcher in *National Wetlands Newsletter*, dated March-April 1995.
5. Memo on S. 605 by John Echeverria, General Counsel for Programs, National Audubon, April 3, 1995.

The following highlights much of the information contained in the five source materials noted above. (References are in parenthesis.)

Utah has very little of its land base in wetlands—an estimated 1 percent compared to a national 5 percent in the lower 48 states (#2).

Utah, to this point, has lost less of its wetlands than other states—30 percent compared to a national average of 50 percent in the lower 48 states (#2).

Utah wetlands are of tremendous value for flood plain protection water quality and wildlife. According to the notes I have for a slide show on Utah wetlands, when the volume of the Great Salt Lake doubled from 1982 to 1986 and reached an elevation of 4,212 feet above sea level, there was over \$175 million in damage.

"The riverine wetlands provide a vital corridor for migratory movement of smaller birds through the arid habitats of the western states (#2)."

The wetlands associated with the Great Salt Lake are of critical, international importance to waterbirds (#2).

A study commissioned by National Audubon Society in April 1994 estimates that the economic activity related to wetlands generates at least \$72 billion annually and almost one million jobs. Recreation, commercial trapping and fishing, flood control, and downstream water supplies are all important economic activities and savings (#3). Utah wetlands also provide numerous economic values.

In losing wetlands we lose a critical resource for our future. The National Status Summary regarding wetlands concludes, "over a 200-year timespan wetland acreage has diminished to the point where environmental and even socioeconomic benefits (i.e., ground water supply and water quality, shoreline erosion, floodwater storage and trapping of sediments, and climatic changes) are now seriously threatened (#2)."

Since over 75 percent of the remaining wetlands in the lower 48 states is on private lands (#1), there certainly should be mechanisms in place to help preserve this vital natural resource heritage for the sustainability of present and future generations.

As Utah Wetlands Coordinator, I am aware of some of these positive approaches to work with landowners. The Wetlands Reserve Program just completed calls for

sign-up in Utah last week. The Intermountain West Joint Venture as part of the North American Waterfowl Management Plan builds voluntary partnerships with all interested parties to save the best wetlands for waterbirds. These are two proactive measures to help save a valuable resource.

I would prefer we could have all carrots in dealing with wetlands. But wetlands have been recognized for their public values in the Clean Water Act. Dredge and fill activities have become regulated functions in private property. This is not done lightly. The current law and regulations and enforcement are efforts to balance the rights of private property owners "with the responsibility of the government to protect public health safety, and welfare * * * including environmental protection (4)." Even though these important regulations are in place, there are estimates that we are still losing 290,000 acres of wetlands per year (3).

I wish we didn't need this stick. Growing up and living in Utah, love the open spaces and freedom that we have enjoyed. I don't like people telling me what I have to do. I have a sense of the frustrations people feel when dealing with environmental regulations. Can't we just live our own lives and do what we want? At the same time have my individual wish for freedom, I live in an increasingly complex community with ever more demands on the natural resource base. It is a tough balance between private property rights for one person and the needs of other individual private property holders and the community.

As Utah Wetlands Coordinator, I have had the opportunity to comment on public notices for dredge and fill activities in wetlands. I have also had the opportunity to be involved on committees developing wetland mitigation for the third runway at the Salt Lake Airport and the Kennecott Copper Tailings Pond. It is my experience that a landowner who is willing to work with the regulatory agencies and the public can resolve a wetlands issue. It should be pointed out that on a national basis of approximately 90,000 Wetlands activities for which a permit (either general or individual) is required, approximately 350 are denied (#4).

Admittedly, wetlands issues are not always easily resolved. Wetlands regulations can cost the landowner and be time consuming. But there are ways to improve the regulations, with mitigation banking as one possibility (#3). These would be attempts to help the landowner get on with his/her business while at the same time maintaining these community, natural resource and economic values of wetlands.

There are two sentences from the Audubon Congressional Guide that I would like to highlight:

1. Regarding wetlands, National Audubon Society cautions the Congress against radical weakening of an already inadequate national wetlands protection program. The national economic and natural resource values at stake are enormous (#3)."
2. Regarding takings legislation, National Audubon Society states that "Congress should reject any and all property rights legislation or amendments and rely on the 5th Amendment of the Constitution, which has effectively and fairly dealt with legitimate government takings for more than two centuries (#3)."

S. 605, the "Omnibus Property Rights Act" as introduced on March 22, 1995 would take away the balance that is needed. It "would revolutionize our traditional understanding of property owners' rights and responsibilities by requiring taxpayers to pay corporate and individual owners to obey virtually any requirement under existing Federal laws. * * * (#5)" Further, "it would require Federal agencies to conduct expensive and time-consuming assessments of how any regulatory action might affect the use or value of property and prohibit Federal agencies from issuing virtually any future regulations that affect the use or value of property unless the Federal taxpayer foots the costs of compliance. These sweeping changes in property rights laws "would severely undermine the property rights and property values of the clear majority of landowners, including all those who live down wind, down river and down slope from polluting industries and destructive development (#5)." S. 605 is so strong in its protection of the individual landowner without much regard for surrounding landowners and the community that it has been described by National Audubon Society as "The anti-taxpayer, anti-property owner, anti-community, anti-environment, anti-constitution pro-bureaucracy, pro-litigation, special interest group bill of rights (#5)."

There is deep and broad opposition to federal takings legislation that would alter the definition of a takings under the Fifth Amendment as interpreted by our U.S. Supreme Court. S. 605 and similar bills are opposed by the National Governor's Association, the majority of State Attorneys General, The National Conference of State Legislatures, The National League of Cities, The United States Conference of Mayors, The National Institute of Municipal Law Officers and The Western States Land Commissioners Association.

Senator Hatch, I know there are tremendous pressures on behalf of private property rights advocates to weaken and perhaps extinguish federal laws that limit private property rights. At the same time the pressures that we are putting on our natural resource base, including wetlands are enormous. Private property rights need to be sensitive to broader needs, so that they do not seriously impair the private property of others nor greatly damage the sustainable, healthy communities we are all trying to build.

Thank you for the opportunity comment.

Sincerely,

WAYNE MARTINSON,
Utah Wetlands Coordinator.

#1



IN THE FIELD

The Key to Protection: Private Lands

by Gene Whitaker

In response to a growing public recognition of the importance of wetlands, a web of federal, state, and local laws and regulations have been spun to protect our remaining wetland resources. Still, although at a decreasing rate, the loss of wetlands goes on. Now, in the name of protecting private property rights, political pressure is increasing in Congress and in state capitols to weaken wetlands protection. Whatever happens in the current debates, we will continue to lose wetlands and those remaining will continue to be degraded unless more emphasis is put on proactive programs to restore critical wetlands that have been lost and better manage those that remain.

Reaching everyone's goal of no net loss and going beyond it to start recovering lost resource values will require us all to work together. Private landowners own more than 75 percent of the remaining wetlands in the lower 48 states, and many of those are partially drained and need work to restore them to their full functions and values. Just as important, they also own most of the sites where wetlands can be efficiently restored. Federal and state agencies and numerous private organizations have initiated a variety of technical and financial assistance programs to assist private landowners to be better stewards of wetland resources. Though all of them could accomplish more with adequate funds, closer cooperation would make them all more effective in working with landowners.

Landowners across the country have shown that they are willing to restore and conserve wetlands when conservation and environmental organizations and local natural resource professionals work with them to explain the value of wetlands and

provide needed assistance. About 15,000 landowners have voluntarily restored approximately 500,000 acres of wetlands in the last decade, assisted by a couple of U.S. Fish and Wildlife Service (FWS) and U.S. Department of Agriculture programs and a few state programs. More than half of this acreage was restored in cooperation with FWS's Partners for Wildlife program, where landowners receive only technical assistance and funds to cover all or part of construction costs. Throughout the country, this program is severely under-

In New York state, more than 1,300 landowners are on waiting lists to participate in the Partners for Wildlife program

funded. In New York state, more than 1,300 landowners who have expressed interest in restoring wetlands are on waiting lists to participate in the program. In Indiana, the FWS discourages publicity about the program, as it only has funds for about 100 projects a year. If a landowner is willing to have a wetland restored without asking for payment for land rights, the public should be able to provide the resources to do the work. It is the general public that will realize most of the benefits in terms of flood control, groundwater recharge, and water quality and wildlife habitat improvements.

Conservation district employees, volunteers, and the local staffs of federal and state agencies as well as some private organizations work regularly with rural landowners on a variety of natural resource

issues. With proper training and resource material, they can be highly effective in delivering wetland restoration and conservation programs to landowners who have grown to know and trust them.

This column will be a regular feature of the new *National Wetlands Newsletter*. In each issue, I will report on and discuss what is happening across the country to facilitate the restoration and conservation of wetlands on private lands. I will discuss informational and educational programs, how differing federal and state programs are together helping landowners protect and restore wetland values; what landowners are actually accomplishing; examples of roadblocks preventing greater accomplishments; and, often, some suggestions for improvements.

In the next issue, I'll report on how some states are working to better target lands accepted into the Wetland Reserve Program, as a result of the May 1995 signup, to accomplish specific state wetland goals and objectives. As you may know, this year, landowners in all states will be eligible to offer lands for the program. I would appreciate hearing from any of you working with the National Resources Conservation Service on the development of state prioritization criteria. Comments, suggestions, and questions also are welcome. Please call or drop me a note.

Gene Whitaker is Director of the National Wetlands Conservation Alliance, a partnership of agencies and organizations working to increase voluntary wetland restoration and conservation on private lands. A principle function of the Alliance is to help start state and local wetlands conservation alliances. Contact Gene at 409 Capitol Court, N.E., Washington, D.C. 20002-4946; Phone: 202/547-6223; Fax: 202/547-6450.

JULY 11, 1991.

THE PROBLEM: LOSS OF UTAH'S VALUABLE WETLANDS

Summary: Utah's wetlands are critical on a State, national and international level for numerous species of birds. They also have major socioeconomic benefits such as improving water quality and providing flood protection. While Utah has lost a smaller percentage of its wetlands than most other states, it is an arid state with far less to lose. *Utah's industrial and agricultural expansion coupled with population growth, are severely threatening Utah's valuable wetlands.*

Background: Utah now has an estimated 1 percent (or 558,000 acres) of its lands in wetlands, while the United States, lower 48 states have about 5 percent (1).

Most of Utah's wetlands are associated with "several large lakes and the delta areas where the rivers enter the lake" (2).

"Utah's wetlands are extensively used by migratory waterfowl, shore and wading birds, and a myriad of songbirds for breeding and as a migratory stopover for resting and feeding" (2).

"The wetlands associated with the Great Salt Lake comprise 80 percent of the total wetlands in the State." The Lake has been nominated as a wetland area of international importance by the International Union for Conservation of Nature and Natural Resources and is part of the Western Hemisphere Shorebird Reserve Network (2).

"The riverine wetlands provide a vital corridor for migratory movement of smaller birds through the arid habitats of the western States" (2).

"Utah wetlands provide a vital, but generally unrecognized, function in the improvement of water quality and associated quantity, allowing its reuse. * * * The value of wetland in flood control is emerging, resulting in a reduction of wetland losses and even improvement in the efforts to restore the function of wetlands by governmental entities" (2).

The Problem: Utah lost an estimated 244,000 acres, or 30 percent, of its wetlands from the 1780's to the 1980's. By comparison, the lower 48 states lost an estimated 117 Million acres, or 53 percent, of its wetlands during this same time period (1).

In the early days of settlement the wetlands associated with the several large lakes and delta areas "were marginal for intensive agricultural use and as such were not seriously impacted. The more ecologically productive areas were set aside as refuges. Subsequent industrial and agricultural expansion, coupled with human population growth, has resulted in encroachment on lacustrine wetland habitats and severe reductions in available water for those wetland areas, including those protected (2).

The palustrine wetlands that surround the major lakes such as Utah Lake and the Great Salt Lake are faced with a threat of piecemeal degradation that has resulted from their ephemeral, intermittent appearance, causing shortsighted and inadequate application of the laws for their protection by responsible agencies" (2).

"An estimated 50 to 60 percent of riparian wetlands has been lost. In urban growth areas, many of the remaining riverine wetlands are being converted to industrial or residential uses. * * * Recently, field studies have identified the presence of environmental contaminants at detrimental levels in wetland areas of the Sevier River and Green River drainages. In some areas, these contaminants (e.g., selenium and boron) are affecting general wildlife production and adult survivability" (2).

The National Status Summary concludes, "over a 200-year timespan, wetland acreage has diminished to the point where environmental and even socio-economic benefits (i.e., ground water supply and water quality shoreline erosion, floodwater storage and trapping of sediments, and climatic changes) are now seriously threatened (1).

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THE TAKINGS ISSUE

(H 3)

Every American citizen has the right to own, use and enjoy private property. This right is central to our basic democratic traditions. Americans have long recognized that the security of private property ownership, and the public health and welfare require reasonable regulation of business activity and other uses of property. Today, however, certain special interest groups are promoting a radical new understanding of private property rights that would adversely affect 65 million homeowners in this country. Their goal is to distort the true meaning of traditional American property rights in order to undermine environmental laws and other regulatory programs that they oppose.

Conservation and Property Rights

Sound environmental protection policies are entirely consistent with, and actually support, private property rights. Air and water pollution control laws, in addition to protecting public health, protect property owners from their neighbors' polluting activities. Zoning and other land use regulations preserve the beauty and stability of a neighborhood, supporting the rights of every property owner in the community.

Many resources that American citizens use and enjoy — such as oceans, rivers, air, wildlife — are public resources that no company or individual has a right to exploit without regard to the broader public interest. Limitations on the disposal of hazardous wastes or restrictions on development in order to protect wildlife certainly can limit private property rights. But the public is entitled to protection of its rights to public resources. A primary goal of environmental laws is to achieve a

reasonable balance between conflicting, but equally legitimate, public and private rights.

In September, Republicans led by Newt Gingrich (R-GA) issued the Contract with America, a 10-point program outlining their goals for the 104th Congress. One element of this program, the so-called "Job Creation and Wage Enhancement Act," includes a proposal, "Title IX. Private Property Rights Protections and Compensation," which would radically redefine traditional American property rights.

Title IX would grant certain property owners the right to public payments "for any reduction in the value of property" arising from a limitation on an otherwise lawful use of property which is "measurable but not negligible." The bill defines any "reduction" in value of 10 percent or more as "not negligible." Stated differently, the bill would require taxpayers to pay whenever a public health or safety law meant that a company's profits would be 10% less than they would be if the company could simply ignore the law.

The proposed bill would allow a property owner to file an administrative claim for payment from the federal government. If a property owner rejected a federal agency's offer of payment, the owner could demand binding arbitration. In addition, upon receipt of a request for payment, an agency would be required to suspend its regulatory action. In other words, for the cost of a 32 cent stamp any company or individual that objected to a regulation could block its enforcement by filing a claim under Title IX.

UNDERMINING TRUE PRIVATE PROPERTY PROTECTIONS

Title IX represents a radical departure from the compensation standard for actual "takings" of private property under the 5th Amendment to the Constitution. The 5th Amendment guarantees that private property shall not be "taken" for public use without "just compensation." The courts have ruled that a "taking" claim must be decided based on a careful evaluation of a regulation's economic impact on the property owner, the character of the regulation, the owner's reasonable expectations at the time of purchase, and whether the regulation helps to protect neighboring property owners and the community as a whole. In contrast to the careful, balanced analysis required under the Constitution, Title IX would focus solely on the regulation's economic impact, or one property owner, and require the public to pay in a great many circumstances when no "just compensation" is due under the Constitution.

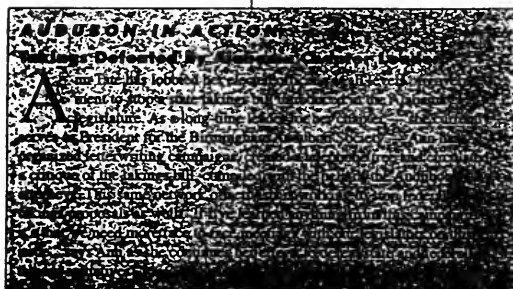
On its face, Title IX would impose an enormous new burden on the federal taxpayer. Businesses subject to public regulation would receive a massive windfall at the expense of every other American. The Congressional Budget Office estimated that a

"property rights" bill in the last Congress which would have redefined property interests regulated under the Clean Water Act would have cost taxpayers upwards of \$10 billion. Conservatively, it is fair to conclude that the Title IX would impose hundreds of billions of new costs on the federal taxpayer.

Title IX are based on the extreme philosophy that citizens and their elected representatives have no role in regulating private property to protect neighboring property owners, the community, the natural environment, or future generations. These bills would actually undermine the property rights of a majority of Americans. Zoning laws, environmental regulations, and restrictions on the siting of new industry protect the property values of 65 million American homeowners. The value of a family's home is largely dependent on the health and attractiveness of the surrounding community. If the enforcement of basic laws that homeowners rely on to protect their property values were saddled with enormous new costs, homeowners would see their property values go down. By contrast, the relative handful of wealthy corporations and individuals who own the lion's share of undeveloped land in this country would benefit handsomely from Title IX.

Action in 1995

☐ Congress should reject any and all property rights legislation or amendments and rely on the 5th Amendment of the Constitution, which has effectively and fairly dealt with legitimate government takings for more than two centuries.



PROTECTING AMERICA'S WETLANDS

Wetlands are among our nation's most valuable natural areas, contributing tens of billions of dollars and hundreds of thousands of jobs to the national economy each year. The cost of destroying wetlands includes not only the elimination of these benefits, but the outlay of substantial expenditures to pay for the replication of the functions a natural wetlands system provides.

The presence of water gives wetland areas remarkable biological productivity. Many species of migratory waterfowl, wading birds, and songbirds depend on wetlands for their existence. Seventy percent of commercially important fish and shellfish species use wetlands as nursery and spawning grounds. An estimated 43% of all endangered species spend part of their lives in wetland habitat. Additionally, wetlands absorb and store water after heavy rains, lowering flood levels and reducing flood damage; purify our nation's water supply by capturing pollutants and excessive nutrients such as phosphorus and nitrogen; absorb impacts of storm surges thereby stabilizing fragile coastlines during major storm events; and naturally recharge our fresh water supply in groundwater reserves. More and more communities are looking to local wetlands as a source of sewage or other water pollution treatment, and state and federal agencies are now recreating riverine wetlands that were destroyed along the Mississippi River as natural flood barriers for the future.

At the time of European settlement, there were approximately 220 million acres of wetlands in the contiguous United States. More than half of those wetlands have since been destroyed or degraded by filling, drainage, dredg-

ing, erosion and pollution. As increasing numbers of wetlands are lost — up to 290,000 acres each year — those that remain have taken on additional value.

The Economics of Wetlands

The economic activity related to wetlands generates at least \$72 billion annually and almost one million jobs, according to a study commissioned by National Audubon Society in April the 1994.

Expenditures on wetland-related recreation alone totaled an estimated \$22.8 billion in 1991; related jobs total over 750,000. These numbers include the indirect and induced economic impacts of annual expenditures from our nation's 18 million recreational hunters, 35 million anglers and the 30 million Americans who enjoy wildlife viewing and photography. In each case, the activities were generated by wildlife that depends on wetlands habitat for at least part of its life cycle.

The abundance of wildlife produced by natural wetland conditions also contributes to another vital source of the American economy: commercial trapping and fishing. Nearly \$2 billion is paid at landing for fish and shellfish and \$10 million is generated in trapped animal furs from species dependent on wetlands each year. These two activities employ an estimated 210,000 people as commercial fishers and trappers. Logging of the low-value tree species specific to wetlands generated over \$1 billion in total economic activity in 1991.

Perhaps most important of all the economic aspects involving wetlands is the cost of replicating the functions they provide once a wetland as been destroyed. If the nation's remaining wetlands were to be destroyed,

AN ECONOMIC INVESTMENT



American landowners and taxpayers would be forced to pay anywhere from \$7.7 to \$30.9 billion each year in flood-related repair costs and flood control structures. Shoreline wetlands save an estimated \$4 million in property damage each year. Downstream water supplies are naturally filtered of particulates and contaminants by wetlands, a process that saves an estimated \$1.6 billion per year in water treatment.

Section 404 of the Clean Water Act

In 1994, the Senate Environment and Public Works Committee marked up a Clean Water Act reauthorization that attempted to address a number of the concerns about the "404" wetlands regulatory program, managed by the U.S. Army Corps of Engineers. The Senate bill put forth a number of new management concepts, including mitigation banking and watershed planning, as a way to plan for

wetlands protection, easier delegation of the management program to the states, and indirectly, to local governments. The Clean Water Act was originally passed to provide national standards and oversight to the national goal of establishing fishable, swimmable waters because the states' record in cleaning up our waters was uneven at best.

As our knowledge about the importance of wetlands to society grew, both the courts and the Congress extended application of the Clean Water Act to the regulation of wetlands. Criticism of the 404 program has grown on both sides: on the one hand, the destruction of wetlands continues at an unacceptable pace and on the other, regulation of wetlands development has become unduly burdensome.

As the Congress takes up reauthorization of the Clean Water Act, we believe it should adhere to national standards and retain oversight over wetlands programs. Passing the 404 program back to the states is likely to speed wetlands destruction because the states do not have the resources to implement wetlands oversight adequately. We encourage Congress to design pilot programs to test alternative methods of protecting wetlands, such as mitigation banking or small landowner permit streamlining, but we caution the Congress against radical weakening of an already inadequate national wetlands protection program. The national economic and natural resource values at stake are enormous.

Action in 1995

Clean Water Act reauthorization should include the following components:

☐ Wetlands protection and restoration as an explicit goal of the Clean Water Act;

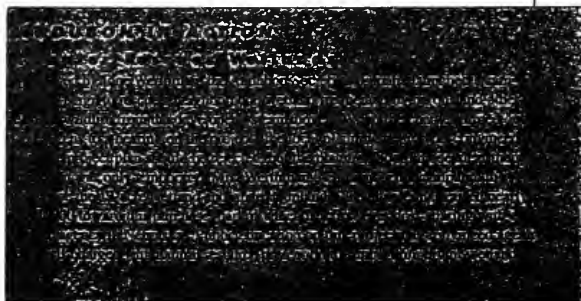
☐ federal procedures for identifying wetlands based on the best scientific information available;

☐ explicit authority for U.S. Army Corps of Engineers to regulate a broader range of wetlands-destroying activities;

☐ a more significant role for state and federal agencies in commenting on permits issued by the Corps;

☐ pilot programs to test ways to administer the 404 program more fairly and efficiently;

☐ better monitoring and oversight of the "general permits" authorized under Section 404.





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Wetlands and the Constitutional Balance

Many members of the 104th Congress came ready to take on the existing wetland regulatory structure. Their battle reflects tensions inherent in our constitutional rights and privileges and the challenges lawmakers face dealing with public expectations concerning those rights

By Lajuana S. Wilcher

Perhaps no single environmental issue has so polarized public opinion as the protection of wetlands. Whether among the red maples of Great Dismal

Swamp, within marshes along the Chesapeake Bay, or around the prairie potholes of the great Midwest, one can almost always find landowners lambasting the federal program put in place to protect these controversial pieces of property. In recent years, these complaints have reached the ears of the press, the public, and members of Congress. The repercussions from recent wetlands

controversies as well as two decades of impassioned wetlands debate are evident as the 104th Congress takes up several proposals that could change significantly environmental regulation in this country. Chief among those proposals is legislation to address unfunded mandates, cost-benefit requirements, and "takings," or private property rights. Dubbed the "unholy trinity" by environmentalists, these are among the most thorny and divisive issues on Capitol Hill. Of the three, the private property rights issue may be the most difficult, and it is being fueled in large measure by concerns over federal wetlands protection policy.

This article reviews some of the reasons that wetlands regulation is a lightning rod for private property rights reform, the constitutional basis for private property rights claims, the pending proposals to expand private property rights, and the arguments that proponents and opponents have made for and against the various proposals. Although it is too early to predict whether or what version

of private property rights legislation might be enacted by this Congress or whether President Clinton would veto such legislation, this article also will examine some potential effects on federal wetlands regulation that could result from an expansion of the traditional constitutional protections for private property owners.

Part land, part water, wetlands are in the cross hairs of regulatory reformers because of the inherent conflicts found

continued on page 14

Since this issue went to press, the House passed a property rights bill, H.R. 1022. More details to follow in the next issue.

Lajuana S. Wilcher is a Partner at the Washington, D.C., law office of Winston & Strawn. She was Assistant Administrator for Water at the U.S. Environmental Protection Agency from 1989 to 1993.

Also in this issue:

- The Conservation Reserve Program: a boon for wetlands
- Haymount and environmentally sensitive development
- One environmentalist on the Corps' nationwide permit "stealth program"

Private property rights, continued from page 1

within the bundle of rights that we expect in this country. People want both the unfettered right to use their land and the right to use and enjoy unpolluted waters. These interests sometimes conflict, and this conflict has been exacerbated by the interplay of a number of complex factors, including a lack of understanding of wetlands values and the belief by some people that any regulation of wetlands is a constitutional taking.

The hydrological and biological nature of wetlands generally is poorly understood by the people expected to comply with the wetlands laws. Many people are not aware of the connections between surface water and groundwater, and the link between the two that wetlands often provide. Similarly, people often are not aware of the economic and ecological importance of wetlands in improving water quality, serving as flood control mechanisms, providing habitat for commercial fisheries, and supporting waterfowl and the waterfowl hunting and recreational industry. And people's understanding of the hydrological and biological relationships between wetland and water is light years ahead of most people's understanding of the wetlands regulatory program, which is a second reason that the program is under attack.

The wetlands regulatory program, established in Section 404

"Public opinion in this country is everything."

— Abraham Lincoln

of the Clean Water Act (CWA), is very complex and is not understood by many landowners. Common misunderstandings, such as whether Congress included the word "wetlands" in the CWA (it did in 1977), or whether normal, ongoing farming activity requires a permit, (it does not) create additional controversy.

Another reason that the wetlands debate is so contentious is that it affects directly individuals, not just corporate America. Early environmental regulatory efforts targeted industrial pollutants being belched from smoke stacks, pesticides that threatened the existence of the bald eagle, and raw sewage that flowed freely from America's towns and cities into her lakes, rivers, and streams. The "regulated community" generally included only corporations and municipalities 20 years ago.

In contrast, federal and state laws that prevent the destruction of wetlands impinge on traditional notions of land ownership and use, and as such affect the millions of people in this country who own approximately 75 million acres of wetlands in

the contiguous United States. Stories of real or perceived unreasonableness by federal regulators against the individual are the stories that are fueling the public's concerns.

In a country where property ownership is a fundamental, constitutional right, use of that property unrestricted by federal regulatory requirements is what some landowners are now demanding. Alternatively, they argue that the Takings Clause entitles them to compensation for more than a minimal reduction in the value of their property should federal regulations prevent them from engaging in certain activities on their property.

The Takings and Commerce Clauses

In 1791, the Bill of Rights was ratified, including Article V, which provides that "no person shall, among other things, be deprived of certain rights . . . nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." The interpretation of this "Takings Clause" determines private property owners' constitutional rights to compensation when the government "takes" their property.

Three years before the Bill of Rights, the Constitution was ratified, providing that the federal judiciary should interpret the Constitution as well as the laws enacted by the U.S. Congress. Until 1922, the Supreme Court generally interpreted Article V to address a physical taking, or permanent occupation of the land. In *Pennsylvania Coal v. Mahon*, the Supreme Court recognized that regulation could be tantamount to a physical taking and justify compensation under the Constitution. Yet in that case, Chief Justice Oliver Wendell Holmes stated, "Government hardly could go on if to some extent value incident to property could not be diminished without paying for every such change in the general law."

Seventy years later, Justice Antonin Scalia, known as a strong conservative, noted and quoted those same words in *Lucas v. South Carolina Coastal Commission*. In *Lucas*, the court revisited the regulatory takings issue and held what the Court had held for seven decades: The regulation of private property must substantially advance legitimate state interests, and that regulation which "takes" all economically beneficial uses of the property entitles an aggrieved landowner to compensation. It is this interpretation that property rights advocates generally seek to expand.

While the Constitution gives the courts the responsibility to interpret laws and constitutional issues, the Constitution gave to Congress the authority to regulate a prescribed list of activities, including "commerce with foreign nations, and among the several states, and with the Indian tribes." The Commerce Clause of the Constitution has been interpreted to give the Congress authority to regulate activities affecting interstate

commerce, which the courts have interpreted to include the regulation of waters used by interstate travelers for public recreation, waters used to irrigate crops sold in interstate commerce, and waters on the flyways of migratory waterfowl. The federal courts also determined that the CWA should be given the broadest constitutional interpretation possible when considering its jurisdiction. It is these interpretations of the CWA and the Constitution itself that have given the federal government the authority to regulate wetlands under the CWA.

Clearly, if the Commerce Clause as interpreted by the courts, or the Fifth Amendment to the Constitution as interpreted by the courts were read without regard for each other or for the other provisions of the Constitution, we would have an irreconcilable conflict. In more than 200 years, and under many changing circumstances, however, the courts have struck a balance. That balance has weighed the rights of private property owners with the responsibility of the government to protect public health, safety, and welfare. This has included environmental protection.

Numerous cases have awarded compensation to landowners when they have been denied permits under Section 404 to undertake activities of their choice. Nevertheless, many people and many members of Congress believe that the judicial process is often too expensive and lengthy, or that the traditional constitutional protections, as interpreted by the courts, simply do not go far enough. These opinions clearly are the genesis of private property rights proposals now before Congress.

The 104th Congress

The public is dissatisfied with the federal government, and that discontent created a political storm that erupted on November 8, 1994. Not only was a Republican Congress elected, but it was a *conservative* Republican Congress that settled in Washington on January 4, 1995, prepared to bring to a head the conflict between unrestricted property use, compensation, and wetlands protection regulatory activities.

Several months ago, on September 27, 1994, more than 300 Republican members of Congress and congressional hopefuls stood on the steps of the U.S. capitol and entered into a Contract with America. Most of those same Republicans ascended the capitol steps to take their seats of political power as the majority party in the 104th Congress. They came committed to enacting the Contract, carrying with them the message that the people of this country were ready for a change in Congress and in the way the federal government conducts the people's business. The Contract supports the principles of individual liberty, economic opportunity, limited government, personal

responsibility, and security, at home and abroad. The Contract states, "a private property owner would be entitled to receive compensation for any reduction in the value of property that is a consequence of a limitation on the use of such property imposed by the federal government." The Contract specifically provides for "compensation for private property takings."

In addition, the Contract provides that within the first 100 days of the 104th Congress, the House Republicans would bring to the floor 10 bills for a vote. Among those bills was the Job Creation and Wage Enhancement Act, which included Title IX, the Private Property Rights Protections and Compensation Act.

With amazing speed, House Republicans have raced through legislative proposals, hearings, and the passage of major pieces of the legislation targeted by the Contract. The Senate, also energized, similarly has moved at a brisk pace. Enactment and implementation of the Contract with America will result in sweeping changes in virtually every aspect of federal regulatory and entitlement programs, from wetlands to welfare.

Private property rights proposals abound on Capitol Hill right now. On the first day of the new Congress, four bills were introduced addressing private property rights issues. Several additional bills have been introduced since then.

On the House side:

• H.R. 9 (reintroduced as H.R. 925), the Job Creation and Wage Enhancement Act, provides that a private property owner is entitled to receive compensation for a reduction in the value of property if the reduction is 10 percent or greater and is a consequence of "a limitation or an otherwise lawful use of the property imposed by a final agency action." The Act also established an administrative procedure for compensation whereby a private property owner may submit a request for compensation to the head of an agency that took the action. Within 180 days after the receipt of a request for compensation, the head of the agency "shall" say the agency action and offer the property owner compensation. The private property owner has 60 days to accept or reject the offer and may submit the resolution to arbitration if he or she rejects the offer. Payment for the diminution in value is to be made by the head of an agency to the private property owner based upon his or her acceptance of the agency head's offer, or a decision of the arbiter, within 60 days.

■
People want both the unfettered right to use their land and the right to use unpolluted waters.

• H.R. 925, the Private Property Protection Act of 1995, was introduced as a substitute for H.R. 9 by Rep. Charles Canady (R-FL). H.R. 925 originally would have limited the compensation provisions of H.R. 9 to those actions taken under wetlands protection programs or the Endangered Species Act, and to those actions that resulted in the reduction of at least one-third of the property value. The Judiciary Committee, however, modified H.R. 925 to return to the provisions of the original H.R. 9.

• H.R. 790, the Private Property Owners' Bill of Rights, introduced by Rep. Billy Tauzin (D-LA), provides for compensation if property value is reduced 50 percent and is the result of federal actions taken under the Endangered Species Act or wetlands protection programs.

• H.R. 971, the Homeowners' Empowerment and Protection Act, introduced by Rep. Ron Wyden (D-OR) and Rep. Wayne Gilchrest (R-MD), provides that property owners can seek compensation for the decrease in property values caused by others, such as developers and industry, if the action of another person decreased the homeowners' property's value.

• H.R. 961, introduced by Rep. Bud Shuster (R-PA), strikes Section 404 and creates a new program that allows anyone whose land is classified as a wetland of critical significance (which would make it difficult to develop the land) to seek compensation from the United States for any resulting diminution in value. The director of the U.S. Fish and Wildlife Service must enter into negotiations with the landowner and make an offer of fair compensation within three months. The landowner may accept the offer, retain title to the land as is, or appeal to the U.S. Court of Federal Claims.

• H.R. 489, the Property Rights Litigation Relief Act, introduced by Rep. Lamar Smith (R-TX), would expand the jurisdiction of certain federal courts to hear takings cases. A taking means actions requiring compensation under the Fifth Amendment.

On the Senate side, bills that have been introduced include:

• S. 22, the Private Property Rights Act of 1995, introduced by Sen. Robert Dole (R-KS), requires that all federal agencies complete a private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation, or related agency action that is likely to result in a taking.

• S. 145, the Private Property Rights Restoration Act, introduced by Sen. Phil Gramm (R-TX), provides for compensation for the reduction in fair market value of private property if the application of a federal statute, regulation, rule, guideline, or policy restricts, limits, or otherwise takes a right to real property if the government action results in a temporary or permanent

diminution of fair market value that amounts to \$10,000 or more, or diminishes the affected portion of the real property by 25 percent or more. Jurisdiction to award compensation is in the U.S. Court of Federal Claims, and compensation is to be paid by the agency or agencies responsible for the statute, regulation, rule, guideline, or policy affecting the reduction in fair market value of the property. Notably, this act excludes from the compensation requirement uses of the property that amount to a public nuisance.

• S. 135, the Private Property Rights Litigation Relief Act of 1995, introduced by Sen. Orrin Hatch (R-UT), sets out new judicial procedures for compensation of private property owners if state or federal agencies take private property (including but not limited to real property and the right to use or receive water.) Taking private property means "any action whereby private property is directly taken as to require compensation under the Fifth Amendment . . . or under this Act." The property owners shall receive compensation if, among other things, the action diminished the fair market value of the affected portion of the property by 20 percent, or by \$10,000. Compensation is not required if the owner's use of the property constitutes a nuisance.

Sen. John Chafee (R-RI), Chairman of the Senate Environment and Public Works Committee, has not introduced any particular legislation addressing private property rights, but he has recognized that some property owners have a disproportionate share of the burden of federal regulations, and suggested that making compensation more easily available, through an administrative settlement process, to small property owners would improve the perception of fairness in environmental regulations. Senator Chafee recognized, however, that current legislative proposals seek to expand the definition of takings and require compensation for regulatory activity that the Supreme Court has never interpreted the Constitution to require.

February ushered in lively hearings on H.R. 925, S. 22, and S. 145. In hearings before congressional committees, proponents of the legislation argued that courts have not gone far enough to protect private property, and obtaining compensation through the courts when a regulatory taking has occurred takes too long and is cost prohibitive for most people. Expanding traditional private property rights protections, proponents argue, will ensure that the government will fairly weigh the costs and benefits of its action and only regulate those things really worth the price. Also, they argue that compensation for the regulation of private property spreads societal costs across society, instead of imposing the burden on the private property owner.

Those who oppose expanding traditional private property rights by legislation argue that the Takings Clause does not

prohibit the reasonable regulation of property rights to protect the public health, safety, or welfare, and that property owners necessarily are limited in the use of their property so that they do not injure the health, safety, or welfare of others. Also, they argue, the legislation would create a windfall if someone purchased property (such as wetlands) and then failed to get permits because of the environmental requirements; denial of permits would mean free money to the landowners from the federal treasury.

In addition, those opposed to expanding private property rights argue that changes that are needed to wetlands and other environmental programs should be made to those programs and not through overarching legislation that could affect every conceivable government action. Opponents believe the costs of paying for every reduction in value resulting from government regulation will effectively stop federal programs to protect the environment.

Potential Passage and Likely Effects

The jurisdiction over wetlands regulation traditionally would have been in the Senate Environment and Public Works Committee and the House Public Works and Transportation Committee (now the House Transportation and Infrastructure Committee.) Within these committees that have jurisdiction over the CWA, changes in membership in the new Congress are significant. Chaired by Bud Shuster, the Transportation and Infrastructure Committee includes conservative majority members such as Don Young (R-AK) and Bill Emerson (R-MO), who have for many years expressed their concerns about wetlands regulation and its effect on private property rights. Minority members include Ranking Minority member Norman Minors (D-CA) and Jimmy Hayes (D-LA), one of the first to push for wetlands regulatory reform. And although Senator Chafee, Chairman of the Senate Public Works Committee, is considered a moderate, the remaining majority members of the committee likely will view favorably some version of the property rights proposals.

The private property rights legislation, however, does not encompass just environmental issues. Accordingly, a number of other committees are involved. The Committee on the Judiciary, the House Agriculture Committee, and the Senate Government Affairs Committee all have held hearings on various private property rights proposals.

While the proposals have met stiff resistance, it is likely that some version of the legislation will pass the House and quite possible that some version will pass the Senate as well. The impact of some proposals, such as S. 22, would make the federal regulatory program even more complicated, but the wetlands

program could survive. Other proposals, such as H.R. 925, are a death knell for the federal wetlands regulatory program. Of approximately 90,000 wetlands activities for which a permit (either general or individual) is required, approximately 350 are denied. Nevertheless, developing a new system of compensating landowners for partial reductions in property values, a system that never has been tried under the Fifth Amendment, would bankrupt the program if the federal government employees enforce the CWA, as currently enacted by Congress. And in

"Conservation means development as much as it does protection. I recognize the right and duty of this generation to develop and use the natural resources of our land... but I do not recognize the right to waste [those resources], or to rob, by wasteful use, the generations that come after us."

— Theodore Roosevelt

today's economic times, with reinventing government in vogue and federal budget cuts imminent, having the funds simply to evaluate claims could cripple the wetlands program.

The current private property rights conflict is part of the larger national debate, a debate that includes issues such as where to draw the line between individual rights and responsibilities, and what the role of the federal government should be. How should we balance the rights of the majority, the minority, and future generations? Rarely is there a clear or bright line on these issues.

From the time people began to live together in communities, we moved beyond the live-for-today, eat-what-you-kill philosophy, to greater or lesser degrees. It is broadly recognized that some accommodation must be made for the future and for our neighbors without trampling the rights of individuals. That very delicate balance has and ever will be shifting, as the people of this country make choices about their future.

The 104th Congress is poised to make major choices about every environmental program in this country, through a number of sweeping proposals such as unfunded mandates, cost-benefit requirements, and private property rights legislation. No environmental program will be affected more than Section 404. In fact, in acting on these proposals, Congress is deciding whether we will have a wetlands regulatory program at all. ■

PREPARED STATEMENT OF NATIONAL AUDUBON SOCIETY

On March 22, 1995, Senator Dole and several other Senators announced the introduction of S. 605, the "Omnibus Property Rights Act." The Senate Judiciary Committee is scheduled to begin hearings on S.605 and other takings bills on April 6.

This memorandum provides a short overview of S. 605—which we think is most accurately described as the "Anti-taxpayer, anti-property owner, anti-community, anti-environment, anti-Constitution, pro-bureaucracy, pro-litigation, special interest group bill of rights." A more detailed section-by-section analysis of the bill follows the overview.

For further information, please contact John D. Echeverria or Sharon Dennis at the National Audubon Society.

An Overview

S. 605 is far and away *the most sweeping, most expensive, and most destructive "takings" bill* ever introduced in the U.S. Congress.

- S. 605 is a long and complicated piece of legislation, but it has *two basic elements*. First, it would revolutionize our traditional understanding of property owners' rights and responsibilities by requiring taxpayers to pay corporate and individual property owners to obey virtually any requirement under existing Federal laws—from the Securities Acts, to the Occupational Safety and Health Act, to the Americans with Disabilities Act, to the Clean Water Act.
- Second, it would require Federal agencies to conduct expensive and time-consuming assessments of how any regulatory action might affect the use or value of property, and *prohibit Federal agencies from issuing virtually any future regulations that affect the use or value of property unless the Federal taxpayer foots the costs of compliance*.
- Based on the rhetoric in S. 605, one would assume that the bill merely restates and reaffirms the Fifth Amendment to the Constitution—which requires that the public pay "just compensation" whenever private property is "taken" for "public use." In fact, S. 605 *fundamentally contradicts the Fifth Amendment*. If a first-year law student described Fifth Amendment takings law in the same terms as S. 605, the student would receive a failing grade.
- S. 605 would *cost the American taxpayer billions of dollars*, because it would require the public to pay "compensation" in many circumstances when there has been no "taking" and no "just compensation" is due under the Constitution. S. 605 would literally require the public to pay polluters not to pollute. It also would allow those who receive Federal subsidies, such as low-cost water from public water projects in the West, to demand public payment if the subsidies are curtailed. It would grant windfall profits to developers who have purchased environmentally sensitive lands at a low price and who could use S. 605 to force the taxpayers to bail them out at a high price.
- S. 605 would compel taxpayers to pay companies and individuals to comply with existing law *with virtually no regard to the fairness or necessity of existing laws*. This radical new approach to takings basically ignores how taxpayer-financed investments in roads, water projects, etc. contribute to the value of private property, the owner's actual investment expectations at the time of purchase, the character of the regulation, or the nature and seriousness of the potential public and private harms if the regulation is not enforced—all factors the courts have said are crucial to the balanced protection of property rights and property values under the Fifth Amendment.
- S. 605 would *eviscerate all types of Federal laws, including vital public health, safety, and environmental protections*. Because the payments under the Act would come from the budget of the agencies whose actions generated a claim, agencies would be forced in dramatic but unpredictable fashion to scale back the enforcement of existing laws. Imposing this enormous, open-ended financial burden on agency budgets is to intelligent regulatory reform what driving blindfolded at 60 mph is to safe driving.
- Contrary to claims by supporters of S. 605, this bill would *severely undermine the property rights and property values of the clear majority of landowners*, including all those who live down wind, down river, and down slope from polluting industries and destructive development. The very narrow protections in the bill for landowners adversely affected by development mean that S. 605 puts developers first and the majority of other landowners, including the 65 million

homeowners, last. A relative handful of large developers and resource industries would benefit the most from S. 605.

- S. 605 purports to "clarify" the law of takings, but the bill would actually create a *grab bag of new and ambiguous legal standards* requiring decades of litigation to begin to sort out. This legislation would make property rights more uncertain and unstable in the future, not less so.
- S. 605 represents a *major Federal intrusion into State and local decision-making*. S. 605 defines State and local government actions, when taken under the auspices of Federal programs, as compensable "takings," even though they clearly are not takings in a constitutional sense.
- S. 605 would generate a *tidal wave of new litigation*, because it would produce a whole new class of lawsuits against the Federal government, further clogging the Federal courts. Ironically, while some of the supporters of S. 605 seek through "tort reform" to limit the ability of members of the public to sue corporations, S. 605 would make it far easier and more profitable for corporations to sue the public.
- Advertised as a form of assistance for the "little guy," S. 605 is *carefully crafted to benefit large special interests*. If a developer purchased a 1000-acre tract, and was required to avoid disturbing even 1 acre of wetlands, the public would have to pay. On the other hand, S. 605 takes no meaningful steps to expedite the resolution of legitimate Fifth Amendment takings claims by landowners of modest means, and would make it more difficult for homeowners and other property owners to enforce existing laws that protect their property rights and property values.

Detailed Discussion of Key Sections

For convenience, the following section-by-section analysis follows the order of the bill itself. This analysis is comprehensive but by no means definitive or exhaustive.

TITLE I—FINDINGS AND PURPOSES

Section 101 includes broad, ungrounded statements concerning the function of private property protection in our society and the meaning and current implementation of the Fifth Amendment.

Ownership of private property is indeed an important American liberty that helps protect citizens from the threat of an overly intrusive government. However, the "findings" go much too far in describing the Constitution as merely a negative limitation on government. The Constitution also reflects the idea that government has a positive role to play in protecting individual citizens and the general public welfare. After all, as the preamble to the Constitution itself reflects, the Constitution was adopted in part to "form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, [and to] promote the general welfare."

Contrary to the implication of the "findings" in section 101, government is hardly the enemy of most property owners. For example, according the U.S. Department of Agriculture, there are somewhere between 70 to 80 million land owners in the United States; most of these, about 65 million, are the two-thirds of all American families who own their own home. Homeowners are citizens who have invested in a particular community and have a justified interest in protecting the value of their property. They generally protect their property interests, not by attacking restrictions on the use and development of property, but rather by supporting strong local zoning, by supporting rules barring polluting industries from residential areas, and by supporting strong environmental standards. *Ironically, because it would undermine the laws that protect homeowners' property values, S. 605 is actually an attack against the majority of landowners in America.*

S. 605 "protects" only a small minority of property owners—those who wish to develop or otherwise exploit property for profit, and who may be constrained from maximizing their profits because of public health, safety, or environmental regulations. *In short, S. 605 is not a "property protection" bill: it is special interest legislation that primarily benefits large developers and resource industries.*

The "findings" also include the statement that "the Federal Government has singled out property holders to shoulder the cost that should be borne by the public, in violation of the just compensation requirement of the takings clause of the fifth amendment of the United States Constitution." This broad statement has no basis in fact. The Fifth Amendment guarantees just compensation to those whose property is in fact taken, and the Court of Federal Claims routinely grants relief to corporations and citizens with legitimate Fifth Amendment claims. Some with viable

claims to compensation, especially owners of modest means, fail to exercise their rights because of the time and expense involved. But it is doubtful that Fifth Amendment claimants have any more difficulty than any other litigants in pursuing valid legal claims; the opposite is more likely true.

Finally, the findings state that the "incremental, fact-specific approach" of the courts to "takings" has been "ineffective and costly and there is a need for Congress to clarify the law and provide an effective remedy." This statement incorrectly suggests that S. 605 primarily focuses on making the remedy for Fifth Amendment takings more effective. In fact, the primary thrust of S. 605 is to jettison the Fifth Amendment and establish an entirely novel theory of property rights. The bill does not "clarify" the law; it radically changes it. S. 605 would not avoid the need for case-by-case fact-specific inquiries: it would dramatically move the line defining a "taking," but it would not avoid the need for a fact-specific inquiry to determine whether a particular claimant falls on one side or the other of this new line.

TITLE II—PROPERTY RIGHTS LITIGATION RELIEF

The name of this Title is a misnomer. Rather than reduce the costs and other burdens of litigation, as the name suggests, this Title would generate a new tidal wave of litigation. It would create expansive new opportunities to sue the government and actually encourage the filing of more lawsuits.

Section 201. Findings

Section 201(1) broadly asserts that property rights have been "abrogated" by Federal agencies' enforcement of existing laws. There is no basis for this statement. As discussed, public health, safety, and environmental laws protect the property rights and property values of the overwhelming majority of American homeowners by protecting the health of the communities in which they live. Those property owners with legitimate claims to "just compensation" under the Fifth Amendment obtain compensation by filing suit in the Federal Court of Claims, and they are even entitled to have the public pay their attorneys fees if their claim has merit. The present U.S. Supreme Court, hardly known for its liberal bias, has been especially vigilant in recent years in enforcing the Fifth Amendment "takings" clause.

Sections 201(2) through (7) attack the current allocation of jurisdiction in the Federal court system, ignoring the sound policies supporting the current jurisdictional scheme as well as the distinctive character of the "compensation" remedy under the Fifth Amendment. Contrary to the implications of these findings, owners suing under the Fifth Amendment cannot obtain both injunctive relief and financial compensation, not because of the way the courts are organized, but because the remedy for a "taking" is "just compensation." As Justice Rehnquist stated in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987): "The basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure compensation in the event of otherwise proper interference amounting to a taking." (First emphasis added)

Section 202. Purposes

Contrary to the statement in section 202, Title II most certainly would not 'establish a clear, uniform, and efficient judicial process whereby aggrieved property owners can obtain vindication of property rights guaranteed by the fifth amendment to the United States Constitution and this Act,' Obviously, the last three words—"and this Act," are key because this Title is not limited to Fifth Amendment property rights; it would create a new version of property rights which has no basis in the Constitution. In addition, this Title does nothing to improve the "efficiency" of judicial procedures, because it hardly addresses the efficiency of the judicial process at all; instead, it would create numerous new opportunities to litigate which would further bog down the entire Federal court system. Finally, the Title will not make the law either more "clear" or "uniform," because the Title introduces many highly ambiguous terms whose meaning would require decades to resolve through litigation.

The statement in section 202 that the Title would "rectify the constitutional imbalance between the Federal Government and the States" is simply incomprehensible. First, the nature of the alleged imbalance being addressed is not defined or explained. Second, the Title does nothing to rectify any such imbalance because it would require public payments for both Federal and State actions which plainly are not constitutional takings; as a result, the bill would inevitably constrain the States in their ability to carry out State programs as they see fit. Thus, rather than relieving the States (and their subdivisions) of any burdens imposed by the Federal government, this Title would result in a major new Federal intrusion into State and local decision-making.

Section 203. Definitions

The definitional section in this Title contains several noteworthy provisions.

First, in section 203(1), "just compensation" is defined as "the full extent of a property owner's loss, including the fair market value of the private property taken and business losses arising from a taking * * * In general, under the Fifth Amendment, 'just compensation' is measured based on the fair market value of the property taken. See *Bowles v. United States*, _____ Fed. Cl. _____ (Fed. Cir. 1994). Allowing 'compensation' for consequential injuries such as 'business losses' would convert the Fifth Amendment takings clause into a new kind of expansive tort claim and enormously expand the public's potential liability.

Second, section 203(5)(D) contains an astonishingly broad definition of "property" encompassing all types of real and personal property including innumerable types of interests in land, rights to use or receive water, contract rights, "any interest defined as property under State law," and "any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest." Defining contract rights, in particular, as a type of property interest would significantly expand the concept of a taking by over turning long standing Supreme Court precedent upholding Congress' authority to adopt legislation affecting contractual relationships. Because essentially every Federal regulatory program affects in some way owners ability to use or develop some form of "property under this broad definition, S. 605 would require public payments to enforce and affect implementation of all or virtually all Federal regulatory laws—from the Securities Acts, to the Occupational Safety and Health Act, to the Americans with Disabilities Act, to the Clean Water Act.

Section 204. Compensation for taken property

This section of Title II would establish a radical new definition of "takings" that has no basis in the Constitution. This section prohibits agencies from taking action inconsistent with this radical new view of "takings," and creates enormous new opportunities for the regulated community to obtain public payments from the government.

Section 204 requires payment of compensation if, as a result of an agency action, two conditions are met: (1) all or part of the owner's private property "has been physically invaded or taken for public use without the consent of the owner," and (2) if one of five other criteria are satisfied See Section 204(a)(1) and 204(a)(2) (A) to (E). Because the term "taking" is defined in section 203(7) of the bill to include any action requiring compensation "under this Act," it is doubtful that the first condition limits the circumstances in which compensation can be obtained. The five other criteria for "compensation" under the second condition include:

- (A) the agency action "does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based";
- (B) the action "exacts" an owner's "right to use" all or part of the property as a condition of any regulatory permit, "without a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property";
- (C) the action results in "the owner being deprived, either temporarily or permanently, of all or substantially all economically beneficial or productive use of the property or that part of the property affected by the action without a showing that such a deprivation inheres in the title itself";
- (D) the action "diminishes" the fair market value of the "affected portion" of the property by 33 percent or more; or
- (E) other circumstances where a taking has occurred "within the meaning" of the Fifth Amendment to the Constitution.

If a claimant alleges a taking based on criteria (A), (B), or (C), the public would bear the burden of demonstrating that compensation is not required. See Section 204(c).

Taken together, these criteria would work a truly radical rewriting of the Supreme Court's Fifth Amendment jurisprudence. Each criterion refers in some fashion to specific factors or even precise language in Supreme Court cases interpreting the Fifth Amendment. But each criterion significantly distorts existing precedent so as to create new public liability where none exists under current law.

First, a general point which applies to several different criteria, including (B), (C), and (D). The Supreme Court has held that a "takings" claim must be evaluated in relation to the "parcel" as a whole. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). This means, for example, that if a developer seeks

to develop a 100-acre tract, and is asked to leave 1 acre undeveloped, a takings claim would be evaluated by looking at the impact of the restriction on the entire 100-acre property rather than the 1 acre. The "parcel as a whole" rule allows a court to realistically assess an allegation of economic injury in light of the owner's actual development plans and expectations.

Section 204, on the other hand, would define the relevant unit of property for the purpose of evaluating a takings claim as the "affected portion" of the owner's property. In the example above, this means that a court would look only at the restriction on the acre and ignore the owner's ability to develop the other 99 acres. This shift in focus would enormously expand the scope of public liability. Any regulation prohibits the use of some portion of an owner's property, and therefore focusing on the specific property interest restricted would always produce the conclusion that a taking has occurred. Just two years ago in *Concrete Pike & Products v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, (1993), Justice Souter, speaking for a unanimous Court, rejected a similar effort to artificially segment the property in a Fifth Amendment "takings" case relating to pension regulations. As Justice Souter said in rejecting the argument that the Court should only look at the affected portion of the property allegedly taken, "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question." 113 S.Ct. at 2290.

One of the consequences of S. 605's redefinition of the relevant parcel is that the very largest owners would receive payment under the bill, even if restrictions imposed on them were trivial in relation to their entire business property.

The "affected portion" approach would not only depart significantly from Supreme Court precedent, it would render completely meaningless the particular threshold proposed for identifying "compensable" takings. Unfortunately, public discussion of recent "takings" bills has focused on a specific numeric threshold, such as 33 percent, that would trigger the requirement to pay compensation." If the relevant unit of analysis is the affected "portion," however, that portion is always taken in its entirety, and there will always be a taking whether the threshold is set at 10 percent, 50 percent, or 100 percent. For this reason, the public discussion of different percentage figures in takings legislation has been completely beside the point.

(A) Turning to the specific criteria, section 204(a)(2)(A) would require the public to pay compensation if the action does not "substantially advance the stated purpose of the legislation or regulation on which the action is based." This criterion obviously derives from the analysis in two recent Supreme Court "takings" cases, but fundamentally distorts the actual meaning of those decisions.

In *Nollan v. California Coastal Council*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), the Supreme Court used the test of whether a regulation "substantially advanced a legitimate state interest" to evaluate whether a regulatory action effected a "taking"—but only in a very narrow context. Both of those cases involved the issue whether a permit condition which required the owner to grant an easement giving the public the right to pass over his private property effected a taking. As the Supreme Court explained in *Dolan*, the right to exclude the public from private property is one of the "essential attributes" of property ownership, and regulations impinging on that attribute are subject to special scrutiny. The test of "substantial advancement," the Court said, provided the appropriate framework for evaluating whether a dedication condition of the type at issue in *Nollan* and *Dolan* effected a taking. No Supreme Court decision holds that the substantial advancement test applies outside of this narrow, specialized context.

From the point of view of "takings" jurisprudence, it is understandable why the Supreme Court has confined this test to this special case. Broad ranging analysis in Fifth Amendment takings cases of both the legitimacy of government policies, and the appropriateness of the means selected to achieve those purposes, would convert the takings clause into the modern day version of the doctrine of substantive due process which held sway in the early part of this century. Most judges and legal scholars believe the expansive doctrine of substantive due process was properly repudiated because it authorized unelected judges to make difficult policy decisions best left to elected officials.

Section 204(2)(A) would convert the "substantial advancement" test into a broad new takings test applicable to all kinds of regulatory actions. This provision would enormously expand upon existing constitutional takings doctrine and convert the full range of potential arguments questioning the legitimacy of government policies

and methods into potential takings claims. Section 204(2)(A) would significantly expand the potential scope of claims for financial compensation from the tax payer.¹

(B) Similarly, section 204(a)(2)(B) invokes some language which appears in the *Dolan* decision but stretches the arguable meaning of this precedent beyond any reasonable bounds. Under this section, any condition attached to a regulatory approval which affects the owner's "right to use all or part of the property would be a compensable taking, unless the agency demonstrated a "rough proportionality" between the purpose of the condition and the impact of the activity being regulated. However, as discussed, *Dolan* only addresses conditions that impinge on the "essential" right to exclude the public from private property, and there is nothing to suggest that *Dolan* has a broader meaning. In fact, in direct contradiction of the approach taken in section 204(a)(2)(B), the Court in *Dolan* specifically distinguished between restrictions on the use of some portion of a property and those dealing with public access to private property, and indicated that the latter type of regulation was subject to a higher standard of review. Section 204(a)(2)(B) would completely ignore the distinction, once again enormously expanding the existing scope of the Fifth Amendment.

(C) Section 204(a)(2)(C) is apparently derived from the Court's decision in *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886 (1992), but, once again, it significantly expands upon the actual scope of the decision. In *Lucas*, the Court held that when a regulatory action eliminates all of a property's economic value, there is a presumption that the regulation constitutes a "taking" under the Fifth Amendment. This presumption can be rebutted, the Court said, only in fairly narrow circumstances. Section 204(a)(2)(C) renders the actual holding in *Lucas* unrecognizable in at least two important respects.

First, section 204(a)(2)(C) shifts the focus from the parcel as a whole to the "affected portion" of the property. This change has the effect of converting the *Lucas* analysis from a specialized approach appropriate to a special case, i.e. where all of a property's economic value is taken away, to a general rule applicable to any takings claim. As discussed above, while it is the rare regulation that eliminates all of the economic value of an entire parcel, every regulation eliminates all of the economic value of some portion of the property.

The consequences of applying the *Lucas* approach to all types of takings cases would be dramatic. Under present takings law, regulations which do not fall into the *Lucas* category are evaluated using a more flexible approach. Specifically, so long as an owner retains some valuable use of the property, the courts are required to evaluate a taking claim by carefully considering the actual economic impact of the regulation on the owner, including the owner's reasonable investment-backed expectations; the character of the regulation; and the private and public harms the regulation would prevent. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Section 204(a)(2)(C) would ignore these important factors.

As a result, for example, an owner who purchased environmentally sensitive lands at a low price knowing of the regulatory obstacles in place could use section 204(a)(2)(C) to make a speculative killing. An owner may only have paid \$100 for the property, but the property might be worth \$1000 if the laws could be ignored. Under S. 605, the developer could demand public payment for restrictions on all or any part of the property based on the \$1000 value, even though this would result in an unjustified windfall at taxpayer expense.

Second, this section states that compensation must be paid whether the restriction is permanent or only temporary in nature. However, the courts have routinely distinguished between regulations which are permanent and those which are only temporary, finding that the former are far more likely to affect a taking than the latter. In *First English*, the Supreme Court ruled that if a regulation is found to effect a "taking" and the agency subsequently rescinds the restriction, it cannot avoid payment of "just compensation" for the temporary period the regulation was in effect. However, contrary to some claims, *First English* does not establish that restrictions which are temporary by design are the same as permanent restrictions from a Fifth Amendment standpoint. See *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. 1992) ("First English does not create a new li-

¹ Means-ends rationality is, of course, a central concern in reviewing agency actions under the due process or equal protection clauses,—as well as under the Administrative Procedures Act. The proposed "substantial relationship" test, if applied generally in a takings context, would not only expand takings doctrine, but it would also mean that a higher level of scrutiny would apply than generally applies under either the equal protection or due process clauses.

ability standard to determine when a 'temporary taking' occurs, but [instead] clarifies the appropriate remedy after a taking is recognized.")²

(D) Section 204(a)(D) also significantly distorts the Constitution by requiring payment when public regulation reduces the value of all or part of any property by 33 percent or more. As discussed, the focus on the "affected portion" effectively makes every regulation a taking and the specific percentage threshold meaningless. Furthermore, the use of a specific percentage figure is inconsistent with Supreme Court precedent. In some cases, as in *Lucas*, the Court has indicated that elimination of all economic value may *not* be a taking, and in other cases, such as *Dolan*, that a regulation which has little or no adverse economic effect on the owner may *be* a taking. The key point is that the Court has repeatedly said the Fifth Amendment cannot be reduced to a numeric formula. As the Supreme Court said just 2 years ago in *Concrete Pipe*, "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." 113 S.Ct. at 2291.

* * * * *

In addition to expanding takings liability under the Constitution, section 204 severely narrows the public's ability to justify valuable regulatory protections. Section 203(d) bars payment of compensation" under the Act if the government demonstrates that the regulated activity "is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood in the State in which the property is located." While based loosely on the Court's decision in *Lucas*, section 203(d) greatly exaggerates both the scope of cases to which *Lucas* applies and the narrowness of the *Lucas* defense.

As discussed above, the *Lucas* case involved an extreme regulation and only established new doctrine appropriate to the extreme case. The Court fashioned a narrow set of defenses for avoiding the presumption that a taking has been effected when a regulation denies the owner all economic use or value of the property. The *Lucas* Court certainly did not say that a similar presumption would apply when a regulation has a less significant impact on the owner, nor that the narrow defenses available in the extreme case would be the only available justifications for regulations that effect less than a total taking. To the contrary, the multi-factor analysis established in *Penn Central* presumes that the vast majority of regulations which do not eliminate all economic value will not be deemed takings.

Section 203(d) overstates the narrowness of the *Lucas* defenses because these defenses are not limited to the situation where the government can demonstrate that the regulated activity would be a nuisance under State law. For example, the Court also stated that no compensation is due under the Fifth Amendment if the activity would interfere with some property right recognized under State law. See, e.g., *Stevens v. City of Cannon Beach*, 317 OR. 131 (1993), cert., denied U.S. (1994) (post-*Lucas* decision holding that background principles of Oregon property law pertaining to beach access justified severe use restrictions on private property). In addition, the Court in *Lucas* indicated that either Federal or State law might be the source of the background principles justifying the restriction. Lastly, the Court included as a catchall that complete elimination of a property's value may be necessary in the case of "actual necessity", such as to stop grave threats to public safety or private property.

Importantly, as the first sentence of section 204 makes clear, this section's enormous expansion of the concept of takings applies to decisions of Federal as well as State agencies. As defined in section 203(6), the term "state agency includes any State agency that (1) "carries out or enforces a regulatory program required under Federal law", (2) "is delegated administrative or substantive responsibility under a Federal program", or (3) "receives Federal funds in connection with a regulatory program established by a State." Section 204 indicates that Federal agencies would be responsible for paying all claims generated by State actions. Nonetheless, Federal legislation requiring financial compensation for State agency actions which clearly are not takings in a constitutional sense would significantly intrude on State decision-making authority. As a practical matter, it is impossible to imagine that Congress could long tolerate a situation in which State agency decisions would be allowed to act as a siphon withdrawing money from congressional appropriations to Federal agencies. Ultimately, S. 605 would directly and severely limit the regulatory prerogatives of State officials.

²The government would be excused from liability under section 204(a)(2)(C) if the property restriction were "inherent in the title itself," a standard which basically tracks the Court's holding in *Lucas*. However, the same defense would not be available under section 204(a)(2)(D) if the claimant asserts a 33 percent reduction in value—a plainly contradictory result.

Section 204(f) provides that any and all payments under this section's expansive compensation requirement would be paid "out of currently available appropriations supporting the activities giving rise to the claims for compensation." If funds were insufficient in the current year to pay a claim, the agency would be required to seek additional appropriations or make the payment out of future year appropriations. This payment scheme would obviously wreak havoc with the usual congressional appropriations process. In addition, in some dramatic but highly uncertain fashion, the threat of agency liability would force agencies to stop enforcing existing laws. The upshot is that many of our most important laws would be gutted through the back door, because agencies would be unable to enforce congressionally mandated public health, safety, and environmental protections.

Section 205. Jurisdiction and judicial review

The jurisdictional provisions of S. 605 grant broad authority to both the Federal District Court and the Federal Court of Claims to issue either or both injunctive and monetary relief under the Act. Thus, both courts would have jurisdiction to grant "compensation" in accordance with section 204, and to issue injunctive relief to enforce Title IV, including the prohibition against any future rule which would result in an uncompensated taking expansively defined.

These provisions would result in a dramatic change in the courts' responsibilities. Claims for compensation under the Fifth Amendment are basically confined to the Federal Court of Claims. Under S. 605, claimants would have two options, either the claims court or a federal district court, and a new opportunity to engage in forum shopping. In addition, the Federal Court of Claims would gain broad new jurisdiction to issue injunctive relief.

These jurisdictional provisions, along with other provisions in S. 605, would fundamentally alter the traditional character of the Fifth Amendment. As discussed above, the basic remedy for a "taking" under the Fifth Amendment is "just compensation." As the Court explained in *First English*, the Fifth Amendment is not intended as a limitation on the government to act, but rather establishes as a condition for the government proceeding that it must pay compensation. S. 605 would dramatically change the traditional Fifth Amendment remedy by authorizing suits not only for compensation for takings broadly defined, but also by authorizing suits to enjoin agency actions that run afoul of the bill's definition of taking.

TITLE III—ALTERNATIVE DISPUTE RESOLUTION

Though a separate Title III is devoted to "alternative dispute resolution," these provisions appear to be essentially meaningless. As discussed above, it is plainly not the purpose of S. 605 to speed the resolution of legitimate claims under existing law. Rather, the purpose is to create new public liabilities that do not exist under the Constitution.

Title III states that either party to a suit under S. 605 may seek to resolve the dispute through settlement or arbitration. With respect to settlement, the bill provides no additional standards or procedures other than identifying settlement as an option the parties may wish to pursue. Thus, it appears to simply recognize the existing opportunity for a claimant and the government to attempt to resolve Fifth Amendment takings claims informally prior to trial. With respect to arbitration, the Act simply refers to the "alternative dispute resolution procedures established by the American Arbitration Association." Significantly, neither party is required to participate in any kind of settlement discussions or alternative dispute resolution procedures without the consent of all the parties.

TITLE IV—PRIVATE PROPERTY TAKING IMPACT ANALYSIS

Section 403 establishes an elaborate "taking impact analysis" (TIA) process to be followed by all Federal agencies. Federal agencies would be required to complete "a private property taking impact analysis" before issuing "any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." This apparently means that a Federal agency must conduct an analysis that covers an entire rule or policy whenever it concludes that in at least one instance the action is likely to result in "a" taking. The term "taking" for the purpose of the TIA process adopts the definition in section 203, which encompasses virtually every conceivable impact that regulation can have on the use or value of private property. As a result, section 203 requires, in effect, that all Federal agencies prepare TIA's for all or virtually all agency actions.

There are various narrow exceptions to the requirement to prepare a TIA, including agency actions involving formal exercises of the power of eminent domain, or certain law enforcement, foreign affairs, or military functions. If an agency action

were required to respond to an "immediate threat to health or safety," the TIA could be prepared after the fact.

The TIA would have to address the "specific purpose" of the agency action, the "likelihood" of a taking, whether the action "is likely to require compensation to private property owners, alternatives that would achieve the agency's "intended purposes" and "lessen the likelihood that a taking of private property will occur, and an estimate of the government's potential liability.

State Attorneys General and others have made a forceful case against taking impact assessment proposals. Carrying out the process would require the hiring of new employees and the expenditure of scarce resources. Estimates indicate that the total cost to the Federal taxpayer might reach several hundred million dollars a year. In addition, whether a constitutional definition or some other definition of taking is employed, it is extremely difficult in reviewing a proposed regulation to determine whether the rule might result in a taking in some specific future situation. Finally, the TIA process, at least as designed in S. 605, would create enormous new opportunities for litigation, benefit opponents of specific regulatory initiatives while hurting the beneficiaries, and generally slow down even more the already glacial pace of Federal bureaucracies.

While the proposed TIA process is sometimes justified by comparison to the environmental impact analysis process under the National Environmental Policy Act, that is a false comparison. The purpose of a NEPA statement is to avoid unnecessary and irreversible damage to environmental resources before it occurs. By contrast, the Fifth Amendment, upon which S. 605 supposedly rests, has nothing whatsoever to do with stopping agency action. It simply guarantees "just compensation" if government action effects a taking," and the opportunity to obtain just compensation in court after the fact fully protects citizens' Fifth Amendment rights. In addition, under NEPA, a balanced and objective NEPA statement helps avoid potential future litigation. By contrast, a TIA would simply provide a road map encouraging future suits against the government.

In addition to establishing an elaborate TIA process, Title IV contains a broad prohibition against any future rules that would result in any uncompensated "taking" under the Act. Section 404(a) states: "No final rule shall be promulgated if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property as defined in the Act." Of course, an uncompensated "taking" as defined in the Act encompasses virtually every conceivable regulatory effect on the use or value of property. The effect of section 404(a) would be to prohibit any agency from issuing virtually any kind of future regulation, unless the public funds in advance the full cost of compliance with the law.

In addition, under section 404, the draconian assessment process would apply not only prospectively, but also retrospectively to all existing rules. Under section 404(b)(1), all agencies would be required to review and, as appropriate, re-promulgate regulations to avoid takings of private property under the Act, and reduce takings "to the maximum extent possible within existing statutory requirements." Given the broad definition of a "taking" under S. 605, it is difficult to imagine what regulatory authority would be left standing once agencies complied with this mandate.

Finally, under section 404(b)(2), all agencies would be required, within 120 days of enactment, to submit to appropriate authorizing committees a detailed list of proposed statutory changes to avoid "takings" to the maximum extent practicable.

TITLE V—PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL OF RIGHTS

This Title, which focuses on section 404 of the Federal Water Pollution Control Act and the Endangered Species Act (ESA), creates special rules for owners challenging the enforcement of either of these two laws. There is no explanation for the focus on these particular laws.

Certainly, this focus cannot be justified on the ground that enforcement of either of these statutes results in a disproportionate number of constitutional takings. So far as we are aware, no Federal court has determined that any regulation under the Endangered Species Act has ever resulted in a taking requiring the payment of just compensation. Only a handful of successful takings suits have been filed with respect to the Clean Water Act. These results are hardly remarkable given the exemptions and flexibility built into the laws, and the fact that the overwhelming majority of projects reviewed under each law are expeditiously approved with little or no controversy.

Furthermore, violations of these laws result in significant injuries to private and public property rights. Section 404 wetlands regulations serve an important function in controlling water pollution and protecting downstream property owners. Both

laws serve to protect wildlife, which is a public property resource, like the air and the water, that the public is entitled to protect against destruction.

Section 503(a)(2) establishes a general mandate for the Secretary of the Army and the Administrator of the Environmental Protection Agency to administer the section 404 program and the ESA "in a manner that has the least impact on private property owners' constitutional and other legal rights." Section 503(b) requires each agency to "develop and implement rules and regulations for ensuring that the constitutional and other legal rights of private property owners are protected when the agency head makes, or participates with other agencies in the making, of any final decision that restricts the use of private property. * * *" Both of these provisions are completely one sided, and ignore how enforcement of the laws protects public and private property rights. Moreover, given the broad definition of "takings" in S. 605, these mandates would effectively require the agencies to stop implementing these laws.

Section 504 prohibits either the Army Corps or the EPA from entering onto private property "to collect information regarding the property, unless the owner has consented in writing to the entry, been given notice of the entry, and been notified of the right to obtain any raw data collected at no cost. There are exceptions to this prohibition in the case of an entry for the purpose of obtaining consent to enter or to provide notice of a planned entry. Significantly, there is no exception for law enforcement purposes. Therefore, Federal government access would apparently be prohibited even if necessary to identify a suspected violation or to halt an ongoing violation of the law. Under section 505, data collected on private land cannot be used to "implement or enforce" the law unless the owner has access to the information, has received a description of how the information was collected, and had an opportunity to dispute the accuracy of the information.

This Title also contains provisions for landowners to file administrative appeals from decisions under section 404 or the ESA. Under section 506, landowners could file administrative appeals, to be heard by an agency official other than the official who took the action, of jurisdictional determinations, denial of or conditions imposed on a permit, administrative penalties, or mitigation orders. In addition, the owner can seek financial compensation administratively. Similarly, under section 507, a landowner can obtain administrative review of ESA decisions, including critical habitat determinations, denial of or conditions on a permit, jeopardy or incidental take determinations, administrative penalties, or "[t]he imposition of an order prohibiting or substantially limiting the use of property, as well as financial compensation.

These broad appeal procedures provide numerous unnecessary opportunities to block enforcement of the law, including implementation of mitigation measures after the owner has been found in violation of the law. In addition, these appeal procedures are entirely one-sided, allowing administrative appeals by those regulated under the laws but not by those protected by the laws. Thus, in this respect as well, S. 605 "protects" the property rights of developers and resource industries, but puts homeowners and others interested in protecting their property values at a significant disadvantage.

Section 508 establishes special procedures for the payment of "compensation" on account of regulatory restrictions under section 404 or the ESA. An owner is entitled to payment if the agency action results in a 33 percent or greater reduction in the fair market value, or the economically viable use, of the "affected portion" of the property, as determined by "a qualified appraisal expert." A claimant may file a request for payment and, apparently without any decision or other intervention by the agency, the agency head "shall stay" the decision and must provide the owner two offers: (1) to purchase the affected property at fair market value assuming no use restrictions, and (2) an offer to compensate for the difference between the fair market value of the property without the restrictions and the fair market value with the restrictions. The owner can accept one of the offers or reject both offers. If he rejects both offers, the owner may submit the claim to binding arbitration.

As under Title II, any award must be paid by the agency 'out of currently available appropriations supporting the activities giving rise to the claim for compensation."

Owners challenging regulatory restrictions under the ESA or Section 404 also apparently would have the right to invoke the judicial compensation procedures outlined in Title II.

RALPH Y. MCCLURE,
CITY MANAGER,
Washington, Utah, July 10, 1995.

Hon. ORRIN G. HATCH,
U.S. Senator,
Federal Building,
Salt Lake City, UT.

DEAR SENATOR HATCH: This letter is a brief summary of the difficult situation Washington City was in as a result of the wetland legislation. Even though this "so called" wetlands violation was not intentional, it created a severe financial hardship that was extremely difficult to overcome.

Washington City is a community of approximately 4200 people located two miles east of St. George. Our annual operating budget at the time the violation occurred was approximately \$500,000.00. We were and still remain a bedroom community, city leaders had for years sought ways to enhance commercial and industrial development.

For a number of years city officials had been negotiating with the BLM, the State Land Board, and private land owners to construct a public golf course. These negotiations came to fruition in the spring of 1988 when a 160 acre tract of land north of interchange 10 in Washington City was acquired. The City had conducted two extensive feasibility studies, then issued a \$4.3 million revenue bond for the construction of the course. Construction began on the course in December of 1989. On May 12, 1989, Mr. Steve Peacock from the Salt Lake City office of the Army Corps of Engineers, arrived on the site. He notified city officials that they had not complied with Corps regulations by failing to apply for a Section 404 permit pursuant to the Clean Water Act. He further informed the city that we could be severely fined if we did not comply. He also indicated that he would be turning this matter over to the EPA.

The wetlands area referred to by Peacock was principally induced through irrigation. Two ditches had been dug years ago around the "wetlands" area to enhance foraging for livestock. The seepage from these dirt bank ditches had created the majority of the "wetland" area.

The City obtained an extensive feasibility study prior to construction. The Study, done by a prominent engineering firm, stated that no Section 404 permits would be needed for this project.

The construction of the golf course had enhanced the environmental aspects of the area. The increased watering and creation of green areas had already attracted waterfowl and wildlife. The presence of the city ensured that the past vandalism and destruction that has incurred in the area would cease. Until construction began, the site was used for a dumping site for waste automobile oil. It was also littered with refuse and debris from illegal dumping.

As a result of this problem Washington City was seriously damaged by the cash requirements to Mitigate this wetlands problem. At least \$589,000 in cash has been spent:

Legal fees:	\$100,000.00
Engineering costs:	100,000.00
Construction costs:	265,000.00
Miscellaneous costs:	14,300.00
Planting & reseeding:	75,000.00

These capital expenses had to be funded by the City and the issuance of bond anticipation notes. In addition, the city was fined by EPA to the tune of \$75,000.00.

For the past five years the city has paid our engineering firm to monitor the mitigated area to determine compliance. On December 19, 1994, the EPA by official letter informed us that we would have to continue monitoring the area for an additional five years.

Washington City definitely feels a need to change the Act at this time.

Sincerely,

RALPH MCCLURE,
City Manager.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
REGION VIII,
Denver, Colorado, December 19, 1994.

Hon. TERRILL CLOVE, MAYOR,
c/o Ralph McClure, Manager,
City of Washington,
Washington, UT.

Re: Green Spring Golf Course
Compliance Order No. 90-20-C

DEAR MAYOR CLOVE: This is to advise you of the statue of the restored and mitigation wetlands on the Green Spring Golf Course as determined through an inter-agency inspection on August 23, 1994. This inspection included yourself, golf course staff, representatives of the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, and EPA.

In general the mitigation/restoration sites appeared to be functioning well, based upon the vegetative growth (plant species present, species diversity, percent cover), water dispersion, presence of wildlife, and general appearance.

There are two areas of concern:

- (1) *The wetland creation west of the 15th green on a hillside.* We recommend that water application be continued at the previous rate and schedule, as this has apparently resulted in an area that shows considerable diversity representative of a wetland/upland transition zone. This type of area provides good wildlife habitat, as animal sign in the area indicated, and makes a significant contribution to the food web.
- (2) *The area to the south of the golf course.* The problems with the sprinkler system have been corrected and the area appears to be slowly developing wetland characteristics. It was indicated that the City has obtained some rights to flows in the spring-fed drainage to the west of this area. We recommend that a portion of the water in this drainage be diverted to the upgradient (north side) of this mitigation area and spread out over the area as soon as water rights are obtained to allow adequate flows to saturate the soils. Any excess flow could then be trapped at the lower end and diverted back to the drainage. This would provide a system of low maintenance and require little personnel time. The current system does not appear to be achieving the intended results in as timely a fashion as had been expected. We have discussed this with Ms. Boyd of Eckhoff, Watson, and Preator, and she agrees that gravity flow from the spring system is a better way to operate the system. She has indicated that she will discuss this with you. We feel that the City can be relieved of further responsibility in this matter once the following conditions are agreed to:

1. The City will incorporate into the restoration/mitigation operations the recommendations stated above. Recommendation (2) above is contingent upon the City's acquisition of adequate water quantities to maintain the described area as an emergent wetland.
2. The City will adopt the monitoring plan currently used by Eckhoff, Watson, and Preator, using fixed photo points and directions. Monitoring reports, which shall include captioned photographs briefly explaining each, shall be submitted to EPA two times annually. Preferred times are early May and early October. Monitoring shall continue for a period of five (5) years from the date of this letter.
3. During the five year monitoring period, the City of Washington agrees to perform whatever measures EPA deems necessary to correct any situation that is resulting in a mitigation/restoration area not functioning as intended.
4. At the end of the five year period, the City of Washington is relieved of monitoring requirements and responsibilities outlined in the EPA Administrative Order 90-20-C.

We recommend you that the restored, created, and pre-existing wetland are waters of the United States, and are afforded full protection under Sections 301 and 404 of the Clean Water Act. It is therefore necessary that any modifications to these wetlands be authorized by the appropriate permit, or by EPA in conjunction with improvements required by EPA.

We appreciate the cooperation you have shown in this matter, and encourage you to contact us should any situation arise on the golf course where we may provide technical assistance in maintaining the wetlands.

Sincerely,

MAX H. DODSON,
DIRECTOR,
Water Management Division.

Please signify your agreement with the conditions outlined in this letter by signing in the space below. Please return the signed original to us for our files and retain a copy for your files.

(Signed) Terrill Clove,

(Dated) 1-5-94

(Typed) TERRILL CLOVE,
Mayor, City of Washington, Utah.

SPRINGVILLE CITY CORPORATION,
Springville, UT, July 7, 1995.

Hon. ORRIN G. HATCH,
Chairman, Judicial Committee,
U. S. Senate,
Dirksen Office Building,
Washington, DC.

DEAR SENATOR HATCH: We are pleased to offer this supplement to the record of the hearing on S. 605 which was held by you in Salt Lake City on July 3, 1995.

We are especially pleased that S. 605, if it is enacted, will provide for some relief to property owners from actions of the U.S. Army Corps of Engineers in regulating wetlands under Section 404 of the Clean Water Act. The actions of the Corps of Engineers in that regard are causing significant problems for Springville City as related below.

Springville City is the owner and developer of land in the northwest part of the city known as Springville City Industrial Park. The land was formerly a pasture. In the 1970s, the city determined to develop the land for industrial use in order to provide jobs for residents of the area.

The first phase of the park was begun in 1976 in the area south of State Highway 75. Improvements in that area, including construction of roads and installation of sewer, water and electric utilities, were partially funded by a grant from the Economic Development Administration. During the construction, a stream which carried a small amount of seepage water and some irrigation drainage was relocated. The old stream channel was abandoned and new streams constructed along both sides of Mountain Springs Parkway, which is the main roadway through the park. Companies which own industrial sites along the street have used the water to create ponds and streams in conjunction with their landscaping. The city also diverted treated sewer effluent into the streams which increased the flow several fold. The ponds and streams are beautiful areas which are habitat for large numbers of wild birds as well as some ducks and geese which have been planted there. Those wet areas were created by the city and the businesses in the park without any requirement by the Corps of Engineers to do so. The net amount of wetlands in the area is substantially greater now than before the industrial park was developed.

One of the building sites in the park was recently sold to E. Excel Corporation. The abandoned stream channel runs through that site. E. Excel began construction on the site earlier this year. The Corps of Engineers considers the old stream channel to be a wetland and has informed the owner that it has unlawfully filled a wetland. The Corps is demanding that E. Excel provide a mitigation area to replace the wetland which has allegedly been destroyed. The Corps has refused to consider any of the wetland created by the city in development of the industrial park as replacing the old stream bed.

There is a similar problem with the second phase of the industrial park which is located north of State Highway 75. Development of that portion of the park was begun in the early 1980s. Again, a large portion of the cost of improvements was funded by a grant from the Economic Development Administration. That funding included on-site improvements as well as a substantial amount for an off-site water line. Other federal funds were involved in the form of an Urban Development Action Grant which allowed Springville City to upgrade its utility systems to provide adequate service to industries located in the park.

As part of the development, Spring Creek, which runs from east to west through the property, was relocated in 1983-1984. The creek was placed in a new channel to minimize flooding in the area and the old stream bed was abandoned. The stream relocation work was done with the knowledge and approval of the Corps of Engineers. Representatives of the Corps were at the job site. The new stream is slow moving and contains large amounts of vegetation and wildlife. The abandoned channel runs through several sites in the park which the city wishes to sell as business locations. The Corps informed the city at the time of the channel relocation that the remainder of the industrial park was not considered to be wetlands and that there would not be a problem with continued development.

The Corps of Engineers has now changed its position. Mr. Dean Allan, the city's economic development director recently toured the area with Corps representatives. Mr. Allan was informed that the Corps considers the abandoned stream bed to be a wetland. In fact, the Corps representatives several times referred to the wetland as "our property" and informed Mr. Allan that the city could do nothing with it except with permission of the Corps of Engineers. The city or its buyers will be required to provide a mitigation area if any of that wetland is used for development. The Corps does not consider the new stream channel to be a replacement or mitigation for the abandoned stream channel.

The unreasonable and changed position taken by the Corps of Engineers makes it extremely difficult, if not impossible, for the city to complete development of the industrial park. The action of the Corps has, in effect, deprived the city of the ability to sell the remaining sites. Approximately 35 acres of property has been effectively taken by the wetlands regulations. Similar property in other industrial parks in Utah County is selling for \$40,000 per acre and higher. That is a taking of property for which the city should be compensated. In addition to depriving the city of the value of the property, the action of the Corps will also end the industrial development which was to have provided jobs for area residents. A substantial portion of the several million dollars of federal and local money invested in the park will be wasted.

If enacted, S. 605 will give Springville City and other property owners in similar situations protection against regulatory deprivation of property as described above.

Section 502(4) of the proposed legislation excludes local governments such as Springville City from the definition of private property owner. Because of that exclusion, it appears that the city would not have any right to the administrative appeal process and other rights under Title 5. State and local governments, in their capacity as property owners, should have the same rights under the act as a private individual. We are concerned that unless the definition is changed, federal agencies such as the Corps of Engineers will be able to regulate lands owned by the city with relative impunity as is the present practice. The committee should consider amending the definition so that state and local governments can also have rights under Title 5 of the bill.

We also wish to point out that the federal government has acted inconsistently with regard to Springville City Industrial Park. Not only has the Corps of Engineers changed its position with regard to what portions of the park are considered wetlands, it is telling the city that it cannot do what another agency, the Economic Development Administration, approved and encouraged the city to do.

Very truly yours,

DELORA P. BERTELSEN,
Mayor.

GORDON F. SMITH,
Councilman.

GLADE Y. CREER,
Councilman.

LEON E. LEE,
Councilman.

GRANT H. PALFREYMAN,
Councilman.

IRIS SORENSON,
Councilman.

THE UNIVERSITY OF UTAH,
COLLEGE OF LAW,
Salt Lake City, UT, July 10, 1995.

Hon. ORRIN G. HATCH,
Chairman, Judiciary Committee,
U.S. Senate,
Washington, DC.

DEAR CHAIRMAN HATCH: We respectfully submit the following comments to be included in the record of the field hearing on private property rights held in Salt Lake City on Monday, July 3, 1995. (These comments reflect the professional views of the undersigned faculty, and not a position of the University of Utah College of Law.)

As a preliminary matter, we would like to request that future field hearings in Salt Lake City be announced publicly sufficiently in advance that we and other members of the public may submit timely requests to testify. We learned of the hearing informally, from a colleague in Washington D.C., just one week in advance. One of us, Associate Dean John Martinez, who has published extensively and who teaches a seminar in the area of property rights, promptly called your office in Washington to request an opportunity to testify at the hearing, but was told that the witness list had already been closed. It is unfortunate that we and other members of the public who may have been able to contribute informed and diverse viewpoints to the Committee were not able to do so due to inadequate public notice.

From a substantive perspective, we believe that federal legislation on property rights is unnecessary and unwise. The due process, equal protection, contracts and just compensation clauses of the Constitution, along with over a century of judicial interpretation and implementation, properly reflect the careful balance that must be struck between the rights of private property owners to use their property responsibly and the rights and needs of the general public to be protected against dangerous or inappropriate uses of that property. As the Supreme Court and the lower courts have recognized consistently, this balance defies rigid formulae, but instead is best determined case-by-case based on the specific facts at issue. In individual cases, the courts properly have balanced such factors as the use of the property and the extent of diminution of property value against the legitimate need for and validity of the public regulation in question. Although the Supreme Court has addressed the takings issue many times over the past century, it has rejected repeatedly the notion that this inquiry can be reduced to precise quantitative or other fixed methods of analysis.

We agree that federal agencies should carefully balance the competing public and private considerations when their actions affect private property, but believe that there are other, more appropriate means to achieve this end. In his article examining state statutes similar to the proposed federal bill, *Statutes Enacting Takings Law: Flying in the Face of Uncertainty*, 26 Urban Lawyer 290 (1994), Professor Martinez carefully considered the problems that need to be considered in this analysis, including public benefits, private benefits, public costs, private costs, and where feasible, a balancing of those public versus private costs and benefits. However, because federal agencies already conduct such analyses routinely pursuant to Executive Order, federal legislation is not needed to achieve this result.

The complexity of the judgments to be made and the importance of the public and private interests affected thus make it inappropriate to attempt to address the property rights issue in an inflexible way through legislation, as proposed in S. 605. Because we do not believe that it is wise to legislate in this area, we provide only a few general observations about the bill rather than a detailed analysis:

Section 204 defines the circumstances under which compensation is required due to federal agency actions. Compensation is required if any one of the enumerated criteria is met. Several of the criteria appear to attempt to reduce existing principles of case law to simplistic, fixed formulae. This is inconsistent with the more flexible and we believe more appropriate case-specific approach adopted by the courts, which is more responsive to the wide variety of circumstances in which takings issues arise. The most drastic change in existing takings law, however, is section 204(a)(2)(D), which would require automatic compensation for any agency action that diminishes property values by a third or more, without any consideration of such factors as the activity affected (single home construction versus hazardous waste site), the location (industrial park versus adjacent to a school), or the nature of public interests at stake (aesthetics versus severe threat to public or environmental health). Rather than carefully balancing private against public rights and interests, the bill thus appears to exalt private property rights over other legitimate rights and interests.

(2) Existing takings law recognizes the need for government agencies to vindicate public rights, while holding agencies properly accountable for actions that cross the line between legitimate government regulation and unreasonable or extreme interference with private property rights. Several provisions of S. 605, by contrast, would impede the ability of agencies to serve the public. For example, section 204(f) would require all compensation claims to be paid out of the affected agency's budget (unlike other federal litigation claims, which are paid out of a central liability account in the Department of Justice). Especially when agency budgets are being reduced by efforts to trim the federal budget, officials may be chilled against taking necessary and legitimate actions to protect public health, safety and welfare, with no reasonable assurance that the proper balance will be struck between private and public rights. Where claims are paid, agencies may be left without adequate resources to do the jobs entrusted to them by Congress and the public. Similarly, section 404, which requires all federal agencies to review not just proposed but all existing regulations that may result in takings of private property, is a mammoth task that could cripple other legitimate agency activities in the interim. Again, to the extent that these provisions are designed to protect the rights of some property owners, they appear to do so at the expense of equally legitimate rights and interests of the public at large.

(3) Section 404(a) prohibits the promulgation of any agency rule if enforcement could reasonably be construed to require an uncompensated taking as defined in the bill. Either we do not understand how this requirement will work, or it will have an even greater chilling effect on legitimate agency activities designed to safeguard the public health and welfare. Under the bill, all agency actions that meet the criteria in section 204(a) will require compensation. The term "taking" is defined in section 203(7) to mean actions that require compensation under the Fifth Amendment or the bill. Thus, the term "uncompensated taking" in section 404(a) is either a null set, or consists of all agency actions that do not meet the criteria in section 204(a), in which case it would appear to prohibit all other agency regulations. Moreover, this provision appears to prohibit the issuance of an otherwise legitimate rule of nationwide applicability if it could be construed to cause an uncompensated taking in even a single instance.

(4) The bill appears to make the federal government financially liable for the actions of state and local regulatory agencies. As noted above, section 204(b) immunizes state agencies from liability for takings in connection with the implementation of federal regulatory programs. But since such actions are compensable under section 204 of the bill, presumably this liability would be borne by the federal government. Yet most federal regulatory programs parallel similar state and local programs, many of which predate or impose stricter or different requirements than those included in federal law. As a practical matter, in many cases it will be difficult or impossible to distinguish between the regulatory impacts of state actions taken pursuant to federal law and those that would be taken anyway under state law. (The definition of "state agency" in section 203(6) of the bill requires only that the action in question be "directly related to" the federal program, not that it be the exclusive source of authority.) Thus, the bill probably will impose liability on the federal government for actions that would be taken anyway under state and local law. This raises serious budgetary questions, especially when the federal government is facing severe fiscal constraints.

Finally, we are concerned that the bill does not state the source of constitutional authority purporting to be exercised. (Unlike other provisions of the Constitution, such as the Fourteenth Amendment, the Fifth Amendment includes no express delegation of legislative implementing authority to Congress.) If Congress chooses to legislate in such an unprecedented area, it should articulate the source of authority for doing so.

We appreciate your consideration of these brief comments as you consider S. 605 and other proposed legislation on private property rights. Because we believe that legislation in this area is not appropriate, we urge you to proceed with extreme caution.

Very truly yours,

JOHN MARTINEZ,
*Professor of Law, Associate Dean for
Academic Affairs.*

ROBERT B. KEITER,
*Director, Center for Environmental
and Energy Law.*

SUSAN R. POULTER,
Professor of Law.

JOHN J. FLYNN,
Hugh B. Brown Professor of Law.

WILLIAM J. LOCKHART,
Professor of Law.

DELL AND JO ANN H. WALKER,
Orem, UT, June 28, 1995.

Senator ORRIN G. HATCH,
*Russell Senate Office Building,
 Washington, DC.*

DEAR SENATOR HATCH: We as property owners have several concerns concerning the taking of our property on the shore of Utah Lake.

When the property was appraised it was not appraised for the purpose for which it was to be used. It was appraised as farm ground and wet lands, we feel it should have been appraised as "campground for the Utah Lake State Park".

In 1973 the state park bought acreage from our family for the expansion of the park. This pasture appraised at \$4000 per acre. This property was not to be used for pasture or farming, but for the expansion of the state park. The property the appraisors are comparing this with was put up for sale by owners and used to farm or pasture.

Less than a year ago property on harbor drive road, 1/4 mile east of the dike sold for \$7,500 per acre for 18 acres to a real estate developer. This property was listed less than two months before it was sold.

Another concern we have is; should Provo City be able to purchase this property in exchange for other property needed for the expansion of the airport when this property is not being used for the expansion at all but used as recreation parking for trailers?

This property has been owned by our family for over 60 years. It is gradually being taken from us by either the city or the state. Back in the early 40's the city bought property from our family for the boat harbor and city park, which was later sold to the state. Then in 1972 the state of Utah parks and recreation purchased the family home and approximately 4 acres for the improvement and expansion of the state park, which adjoins the property now in condemnation.

The first appraised offer that was made to us was a flat \$14,000 for 40.8 acres by Provo City. Our refusal caused it to go into condemnation. The appraisal on our property averaged out to be \$340 per acre.

The last appraisal was \$58,000. Three-thousand dollars was for 8.5 acres and \$1000 was for the remaining 32.3 acres, which is being called wet lands. Actually, no one can tell us why this 32.3 acres was considered as wet lands. This information seems to have come from the engineers who are working on the airport expansion. This property is basically the very same on all the property along the lake front. We never knew it was classified as wet lands before this time. We feel this is a very unfair appraisal. The property all around us is being sold for much more.

We appreciate the interest you are taking in the Horton and Edwards property for additional camp grounds and future boat docks for the state park, which is being traded for property on the south side of the river for the expansion of the airport.

We are indeed sorry we are unable to attend this hearing. Thank you for everything you are doing.

Sincerely,

THE HORTON FAMILY,
 LOIS JEAN H. SHURTLEFF,
 JO ANN H. WALKER,
 F. ARNOLD HORTON.

Written Testimony of Benjamin Slough
area individuals on
"The Omnibus Property Rights Act of 1995"

July 6, 1995

Dear Senator Hatch,

We in the Benjamin slough area are very concerned about property rights and the takings of property which exist. We feel that "The Omnibus Property Rights Act of 1995" will be one of the things that will help to relieve property owners of some of the problems we are faced with.

Our situation is a little different than many being addressed, in that it is not the actual taking of property but restricting how and to what extent some of the property in this area can be used. Our problem comes from not being allowed to maintain the Benjamin Slough as the flow of drainage water from a large portion of southern Utah County, brings sediment that settles in this slough causing it to restrict the flow of water more and more over the years. This needs to be maintained on a yearly basis where needed, to keep the flows moving out of the area. We are seeing these flows increase as development in the areas about us take place and also as more water comes into the valley it increases the amount of water to be drained out of the area also. The increased water comes from the added population, which is drilling more water wells and increasing the amount of ground water in the area. And drainage from other sources such as irrigation of upstream land, the unconsumed water from households which enters the water table through field drains and much of the area above us being covered with buildings and pavement.

All of these items combined are very critical to the existence of those of us who farm, ranch, and reside in the Benjamin Slough area. In some past years approximately 2600 acres have been flooded with surface water, due to the fact of restricted flow of Benjamin Slough. As a result of the minor maintenance allowed in 1995 this flooded acreage was reduced by 50%. Although not flooded with water much acreage beyond this area is detrimentally affected as water is high. Nearly every spring, water from all the entities that have water, drain into the Benjamin Slough, which include a great number of different sources. Some of these sources are mountain runoff, surface runoff from storms, underground drains, water discharged from city sewer plants and numerous others. These all combined are the cause of great grief and economic loss to many people, as well as the health threat posed because of backed up septic tanks and stagnant water which creates a breeding area for mosquitos. Much of this could be reduced greatly if Utah County were allowed to maintain the Benjamin Slough through the removal of sediment as needed for its entire length, and thus increase the flow of water to Utah Lake.


During the week of January 15-21, 1995, Utah County was allowed by the State of Utah to remove sediment from approximately .36 of a mile section of a 1.5 mile part of the Benjamin Slough, all of which needs maintenance badly. There is also another section approximately .75 miles long directly south of this area which

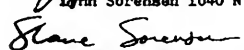
needs maintenance badly also. We have seen this maintenance increase the flow 25% to 35%, which makes a considerable difference when the Benjamin Slough flows in excess of 200 cubic feet per second at high peaks. This removal of material allowed flood waters to move out of the area much more rapidly and into Utah Lake. Although many areas will remain under water 3 months or more because much more sediment must be removed for the flows to be as they should. The increase in flow this year shows that this can be improved if this work is accomplished. The 2000 feet that were allowed to be cleaned had many unrealistic stumbling blocks as you can see from the documents included with this letter.


It is due time that those who suffer economical losses or losses of any other kind, and that the public health concerns in this area be corrected. We know from experience that unless something is done this problem of restricting the flow of the Benjamin Slough which creates flooding, that it will do nothing but worsen as it has over the years. Projects of bringing water into the Utah Valley have been of great benefit to the Valley as a whole as well as the individuals on the Benjamin Slough on their land away from this area. But this area has been wetter ever since the Strawberry Project brought water into the valley and will be affected in the future as other projects of this nature put more water in the valley such as the Central Utah Project is doing. Thus it is important that the area is provided adequate drainage as these projects and other changes take place. We feel that the will being of those in these areas need to outweigh the thoughts of Army Corps, Audubon Society, Stone Fly Society and others like these who stop these things from taking place. They have no right to affect our property right in these matters as they are currently doing. With the ownership of the Benjamin Slough undefined, it has been difficult to get cities, U.S. Forest Service, homeowners, landowners and others contributing to the problem to take responsibility for maintenance. With the commitment of Utah County to be the responsible party, we feel the maintenance should not be restricted because of these different groups. There has been opposition from the above mentioned groups in connection with the desire to maintain the Benjamin Slough. All that is being asked, is to maintain the Benjamin Slough to the level that it can adequately handle the flows put into it, not to enlarge it from what it once was. The Army Corps restrictions on the maintenance of the Benjamin Slough have been to restrictive for us to accomplish proper channel maintenance. Though the wetlands bill has good intent, we believe their actions in this specific case are inappropriate. We believe passage of this bill will help to maintain private property rights.

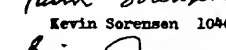
Sincerely,
Benjamin Slough Landowners

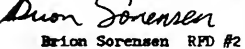
Benjamin Slough Landowners

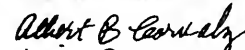

 Lynn Sorensen 1040 N. 300 W. Sp. Fork, UT 798-6489

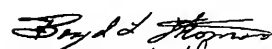

 Shane Sorensen RFD #2 Box 0 Sp. Fork, UT 798-6489



 Kevin Sorensen 1040 N. 300 W. Sp. Fork, UT 372-0762



 Brian Sorensen RFD #2 Box 0 Sp. Fork, UT 372-0762

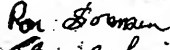

 Albert B. Cornaby 5757 S. 3200 W. Sp. Fork, UT 798-6706

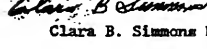

 Janiece Tanner 5690 S. 4500 W. Sp. Fork, UT 798-7917

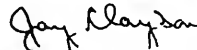

 Boyd L. Thomas 5649 S. River Dr. Sp. Fork, UT 798-6666

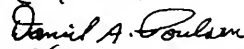

 Karen H. Thomas 5649 S. River Dr. Sp. Fork, UT 798-6666



 Marion Sorensen 5442 So. 1850 West Sp. Fork, UT 796-3645


 Ron Sorensen RFD #2 Box 56 Sp. Fork, UT 798-3645


 Clara B. Simmons RFD #2 Sp. Fork, UT


 Jay Clayson 5626 S. 300 W. Sp. Fork, UT 798-3158


 Daniel A. Poulsen 431 S. 900 E. Sp. Fork, UT 798-3307


 John D. Youd 5411 S. 3200 W. Sp. Fork UT 798-6641

Benjamin Slough Landowners

Cleir O. Anderson
Cleir O. Anderson

Cleir O. Anderson
 6818 S. 4000 W.
 Benjamin, UT 798-6088

Wayne C. Anderson

Wayne C. Anderson
 6986 S. 4000 W.
 Benjamin, UT 798-8907

Dennis S. Carr

Dennis S. Carr
 5020 W. 6300 S.
 Lake Shore, UT 798-2206

Kevin J. Anderson

Kevin J. Anderson
 2825 W. 7300 S.
 Benjamin, UT 7988469

Merrill Beckstrom

Merrill Beckstrom
 3292 W. 7300 S.
 Benjamin, UT 798-2534

Donald Wride

Donald Wride
 6612 S. 3200 W.
 Benjamin, UT 798-6542

Neil L. Anderson

Neil L. Anderson
 4415 W. 6400 S.
 Lake Shore, UT 798-7679

Dale & Holly Beckstrom

Dale and Holly Beckstrom 3892 W. 6400 S. Benjamin, UT 798-7631

Steve Shaffer

Steve Shaffer
 5033 W. 6300 S.
 Lake Shore, UT 798-8339

Donette Carr

Donette Carr
 5020 W. 6300 S.
 Lake Shore, UT 798-2206

Benjamin Slough Landowners

<i>Snell Swenson</i> Snell Swenson 295 E. 400 N. Sp. Fork, UT 798-7102	<i>Gerald L. Hill</i> Gerald L. Hill 5851 S. Depot Road Panguitch, UT 798-6547
<i>G. Wayne Anderson</i> G. Wayne Anderson 7355 S. 1200 W. Sp. Fork, UT 798-7875	<i>Frank A. Beckstrom</i> Frank A. Beckstrom 520 S. Main Payson, UT 465-2342
<i>Robert W. Llewellyn</i> Robert W. Llewellyn 1085 E. 1050 S. Sp. Fork, UT 798-6355	<i>Ralph Andrus</i> Ralph Andrus 167 N. 100 W. Sp. Fork, UT 798-3283
<i>Ronald L. Jensen</i> Ronald L. Jensen 601 S. 700 W. Payson, UT 465-3146	<i>Matt Johnson</i> Matt Johnson 1782 W. 6400 S. Lake Shore, UT 798-6554
<i>Bill Beck</i> Bill Beck 1776 W. 6800 S. Leland, UT 798-6590	

Sorensen Angus Ranch
 1040 North 300 West
 Spanish Fork, Utah 84660

798-6589
 President - Lynn Sorensen
 Vice-President - Kevin Sorensen

Fax 798-7819
 Secretary - Sheree Sorensen
 Vice-President - Brian Sorensen

February 23, 1995

Clyde Naylor & Utah County Commissioners
 Utah County Public Works
 2855 South State Street
 Provo, UT 84606

Re: Stream Channel Dredging of the Benjamin Slough

Gentlemen:

Yesterday Greg Mladenka and Paul Hawker stopped by our business to talk about the Benjamin Slough. They also delivered a letter from the Corps of Engineers which was signed by Brooks Carter, but was dictated by a young know-it-all kid by the name of Diana MacInnes. This letter is very much uncalled for and incorrect.

We have a family owned cattle business, and in connection with this, we own and lease property along the Benjamin Slough Channel. We have been flooded for months at a time, because water could not travel freely through the slough channel. After many hours of discussion with federal, state and local officials, the channel was finally opened up.

Our family also owns a construction company. We were the low bidder on the dredging work. This made us happy because it gave us some control on the materials being placed on our private land. It also made our neighbors feel a little more at ease, knowing the contractor doing the work.


L & M Construction has no magic equipment that can take soupy, wet mud out of a channel filled with running water, and throw it 250' to 300' to the outside of an invisible line called Wet Lands. This material has to be placed on the bank 25' to 50' away from the channel, allowed to set for a time so the water can drain out, then bulldozed to an upland site, the invisible line called Wet Lands. We have made three attempts to move this very wet and spuddy material, only to have our donors and trackhoes stuck in the Wet Land areas that we are trying to save. When the timing is right, we will move any questionable material.

Now, as property owners who pay the taxes and make the payments on the private property, we feel we have the right to have some input as to where the dredged material should be placed. After all, we are the people trying to make a living on this land. Cows have a hard time grazing under water and on top of mud. We feel that the customers and tax payers have been overlooked.

In the letter from the Corps of Engineers, we find no comment at all concerning the fact that the water in the channel is a foot lower and travels 25% faster. Is this not the goal? Have we as property owners missed the point? Do you as elected officials need more input from your customers? Do we want to turn this job into a \$300,000.00 project? As land owners and contractors who have done this type of work since the flood of 1952, we do have a little common sense. We hope you'll stand by us through this very controversial project.

We appreciate the time and effort expended by Utah County employees and those from the State Engineer's Office to resolve any of the past and future problems.

Sincerely,


 Lynn Sorensen
 Sorensen Angus Ranch, Inc.



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

Michael G. Lucita
 Governor

Ed Shumet
 Secretary

Robert L. Morgan
 State Engineer

1435 West North Temple, Suite 220
 Salt Lake City, UT 84114-0135
 801-438-7290
 801-438-7457 (Fax)

February 24, 1995

Brooks Carter
U.S. Army Corps of Engineers
1403 South 600 West Suite A
Bountiful UT 84010

RE: Stream Channel Alteration Application 93-53-01SA

Dear Mr. Carter:

This letter is in response to your letter of February 17, 1995, in which you outlined concerns regarding Stream Channel Alteration Permit Number 93-53-01SA to enlarge and dredge the Benjamin Slough Channel. In your letter, you stated that the work done at Benjamin Slough was out of compliance with the GP-040 permit issued. The two aspects mentioned were dredged material was discharged into wetlands and an inappropriate amount of material was dredged from the slough. The county has admitted to being out of compliance concerning material placed in wetlands and is currently in the process of removing it to upland areas. Your concern that too much material was dredged from the site is erroneous, as cross-sections of the dredged areas are basically consistent with areas adjacent to the project.

We are not considering levying a fine for several reasons. While there certainly were breakdowns in communication among the involved parties, we do not feel Utah County willfully violated conditions of the permit. We believe Utah County is currently acting in good faith to remove the material to an upland site. Secondly, a fine would not accomplish the goal of restoring the wetlands to their original condition, and could possibly serve to strain the situation without contributing to any real purpose. If the situation should arise wherein Utah County does not remove the material from the wetlands, we feel it would then be appropriate for the Corps of Engineers to intercede.

If you have any questions or comments, please feel free to contact me or Greg Madenka at 801-638-7375.

Sincerely,

Robert L. Morgan, P.E.
 State Engineer

February 17, 1955

Utah Regulatory Office (199350269)

Robert L. Morgan
State Engineer
Utah Division of Water Rights
1636 West North Temple, Suite 220
Salt Lake City, Utah 84116-3156

Dear Mr. Morgan:

This letter concerns Stream Channel Alteration Permit Number 93-53-015A to enlarge and dredge the Benjamin Slough Channel.

Last week Greg Mladenka of your office and Drasa Maciunas of our office made an inspection of the above mentioned project in the company of Paul Hawker and Gary Radcliff of the Utah County Engineer's Office, as well as the contractor who did the dredging, Lynn Sorensen. As I'm sure you are aware, it was discovered in this meeting, that requirements of the permit were not followed. We found this shocking and very disturbing because of the great deal of coordination and discussion which had taken place between the involved parties prior to issuance of the permit. Even the contractor had been involved in the early conception of this project and was aware of the requirements. Yet when the dredging was done there was no supervision of the project by Utah County and requirements of the permit were ignored.

We have concerns with two aspects of the project. One is that dredged material was discharged into wetlands along most of the length of the project. This was expressly forbidden by Condition 4 of the permit. This necessity was also thoroughly discussed prior even to application for the permit in meetings between Utah County, the proponents of the project, the Corps of Engineers, and Senator Hatch. In fact, Senator Hatch made a point of getting an agreement from the project proponents that there would be no discharges into wetlands. Our other area of concern is whether the contractor dredged the proper amount of material from the slough. It appears from the amount of discharged material, that he may have gone beyond what was allowed under the permit. When asked about quality control on the project, the contractor expressed that he was more concerned about dredging too little than he was with exceeding limits imposed by the permit. In the case of a blatant violation, it may be appropriate for you to consider levying a fine.

From the observations made above on how this project was carried out, it appears that Utah County and the contractor willfully disregarded the requirements of the permit. They also avoided attempts by our agencies to provide oversight, by not notifying us of the start of the project as we both had requested. We feel that this constitutes a serious violation of Section 404 of the Clean Water Act and should be dealt with accordingly. At minimum, Utah County will need to remove the discharge from wetlands along the slough as well as demonstrate that they have dredged in compliance with their permit.

If you would like to discuss this situation further, please contact myself or Drasa Maciunas, at the Utah Regulatory Office, 1403 South 600 West, Suite A, Bountiful, Utah 84010, telephone (801) 295-8380.

Sincerely,

Brooks Carter
Chief, Utah Regulatory Office

Copies furnished:

Clyde Naylor, Utah County Engineer, Utah County Public Works,
2855 South State Street, Provo, Utah 84606
Bob Mairley, U.S. Environmental Protection Agency
Clerk Johnson, U.S. Fish and Wildlife Service
Robert Valentine, Utah Division of Wildlife Resources



State of Utah
 DEPARTMENT OF NATURAL RESOURCES
 DIVISION OF WATER RIGHTS

February 16, 1995

Michael G. Lewis,
 Governor

Ted Stewart,
 Executive Director

Robert L. Morgan,
 State Engineer

1836 West North Temple, Suite 220

Salt Lake City, UT 84116-8155

801-538-7260

801-538-7457 (Fax)

Clyde Naylor, P.E.
 Utah County
 2856 South State Street
 Provo, UT 84606

RE: Stream Channel Alteration Permit Number 93-53-01SA to enlarge and dredge the Benjamin Slough Channel.

Dear Mr. Naylor:

On Friday, February 10, 1995, Greg Mladenka of this office performed a compliance inspection of this project. Present were Paul Hawker and Gary Ratcliff of Utah County, contractor Lynn Sorenson, and Drasa Maciunas of the Corps of Engineers. The project appears to have accomplished the goal of reducing local backwater effects. Mr. Sorenson stated velocities at the county bridge, just upstream from the project area, have increased from approximately 1 fps to 1.25 fps. Sills of resistant material were removed in several areas, allowing improved water passage. According to Mr. Hawker, cross-sections are in accordance with design standards.

Condition Number 4 on the Stream Alteration Permit states "All spoils and dredged materials must be removed to an upland site away from identified wetlands and any natural stream channel". At the time of the inspection, this condition had not been met. Any fill material remaining in wetlands or within 25 feet of the slough bank should be moved to an upland site by March 1, 1995. Otherwise, the project is in compliance.

Please contact me or Greg Mladenka at 538-7375 when this work is completed or if you have any questions.

Sincerely,

Robert L. Morgan, P.E.
 State Engineer

RLM/gm/

pc: Drasa Maciunas - Corps of Engineers
 Lynn Sorenson - Contractor

AGREEMENT NO. 1995-

CONTRACT

THIS AGREEMENT, made and executed in three original counterparts this 11th day of January, 1995, between UTAH COUNTY, hereinafter called "Local Agency" first party, and L & M CONSTRUCTION CO., Spanish Fork, hereinafter called "Contractor", second party.

WITNESSETH, that for and in consideration of payments, hereinafter mentioned to be made by the local agency, the Contractor agrees to furnish all labor and equipment, to furnish and deliver all materials, not specifically mentioned as being furnished by the Local Agency, and to do and perform all work in the Benjamin Slough Channel Dredging Operations:

DREDGING OPERATIONS
BENJAMIN SLOUGH CHANNEL
Near 5800 West 6400 South

for the sum of TWENTY SEVEN THOUSAND FIVE HUNDRED and NO/100 DOLLARS (\$27,500.00).

The Contractor further covenants and agrees that all of said work and labor shall be done and performed in the best and most workmanlike manner and in strict conformity with the specifications. The said Specifications, Notice to Contractors, Instructions to Bidders, General Requirements, Scope of the Work, and Bid Proposal, collectively referred to herein as the "Contract Documents," are hereby made a part of this Agreement as fully as if the same had been set forth at length herein.

In consideration of the foregoing premises, the Local Agency agrees to pay to the Contractor in the manner and in the amount provided in the said Specifications and Proposal.

Notwithstanding anything contained in the Contract Documents to the contrary, the following terms shall control:

1. The obtaining by Utah County of an extension of Alter Natural Stream Number Permit No. 93-53-01 SA shall be an absolute condition precedent to any obligation or liability of Utah County, under this Contract and shall be an absolute condition precedent to this Contract becoming effective.
2. The Contract performance by the Contractor must occur while frozen ground conditions exist at the location of the project.
3. Contractor herewith agrees to indemnify and hold Utah County, its officers, agents, officials and employees, harmless

from any action, causes of action, claims for relief, demands, damages, expenses, costs, fees, attorney's fees, or compensation, whether or not said actions, causes of action, claims for relief, demands, damages, costs, fees, expenses and/or compensations are known or unknown, are in law or equity, and without limitation, all claims of relief which can be set forth through a complaint or otherwise, that may arise out of this Contract or Contractor's performance of this Contract.

IN WITNESS WHEREOF, the parties herewith have subscribed their names through their proper officers thereunto duly authorized as of the day and year first above written.

BOARD OF UTAH COUNTY COMMISSIONERS

By: *W. H. H. H. H.*

Chairman

ATTEST:

J. BRUCE PEACOCK

Utah County Clerk/Auditor

By: *Shirley R. England*

Deputy

L & M CONSTRUCTION CO.
CONTRACTOR

Name: *Raymond J. ...*

Title: *Owner*

R. L. De ...
Witness



State of Utah
DEPARTMENT OF NATURAL RESOURCES
DIVISION OF WATER RIGHTS

Michael G. Leavitt
 Governor

Paul Stewart
 Secretary

Robert L. Morgan
 State Engineer

1638 West North Temple, Suite 220

Salt Lake City, UT 84116-3158

801-626-7340

801-626-7407 (Fax)

January 11, 1995

Clyde Naylor, P.E.
 Utah County
 2855 South State Street
 Provo, UT 84606

Re: Stream Channel Alteration Permit Number 93-53-01SA to enlarge and dredge the Benjamin Slough Channel.
EXPIRATION DATE: March 1, 1995

Gentlemen:

Permit to Alter a Natural Stream Channel Number 93-53-01SA is hereby extended from January 7, 1995, to March 1, 1995, pursuant to the requirements of Section 73-3-29 of the Utah Code Annotated, 1953. This extension also constitutes compliance with Section 404 (e) of the Clean Water Act (33 USC 1344) pursuant to General Permit 040 issued to the State of Utah by the U.S. Army Corps of Engineers on October 15, 1987.

Work performed under this permit is subject to the conditions of the original permit.

Within 30 days after the completion of this project, the State Engineer's office must be contacted for a compliance inspection. Failure to provide such notification would invalidate U.S. Army Corps of Engineer's General Permit 040, thereby placing the applicant in violation of Section 404 of the Clean Water Act. Arrangements for this inspection may be made through Greg Mladanka of this office.

This Decision is subject to the provisions of Rule R655-6 of the Division of Water Rights and to Sections 63-46b-13 and 73-3-14 of the Utah Code Annotated, 1953 as amended, which provide for filing either a Request for Reconsideration with the State Engineer, or an appeal with the appropriate District Court. A Request for Reconsideration is not a prerequisite for a court appeal. A court appeal must be filed within 30 days after the date of this Decision, or if a Request for Reconsideration has been filed, within 30 days after the date the Request for Reconsideration is denied. A Request for Reconsideration is considered denied when no action is taken 20 days after the Request is filed.

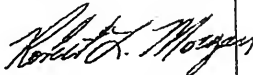
Page 2

93-53-01SA

January 11, 1995

If you have any questions or need further clarification, please feel free to contact Greg Mladenka at 538-7375.

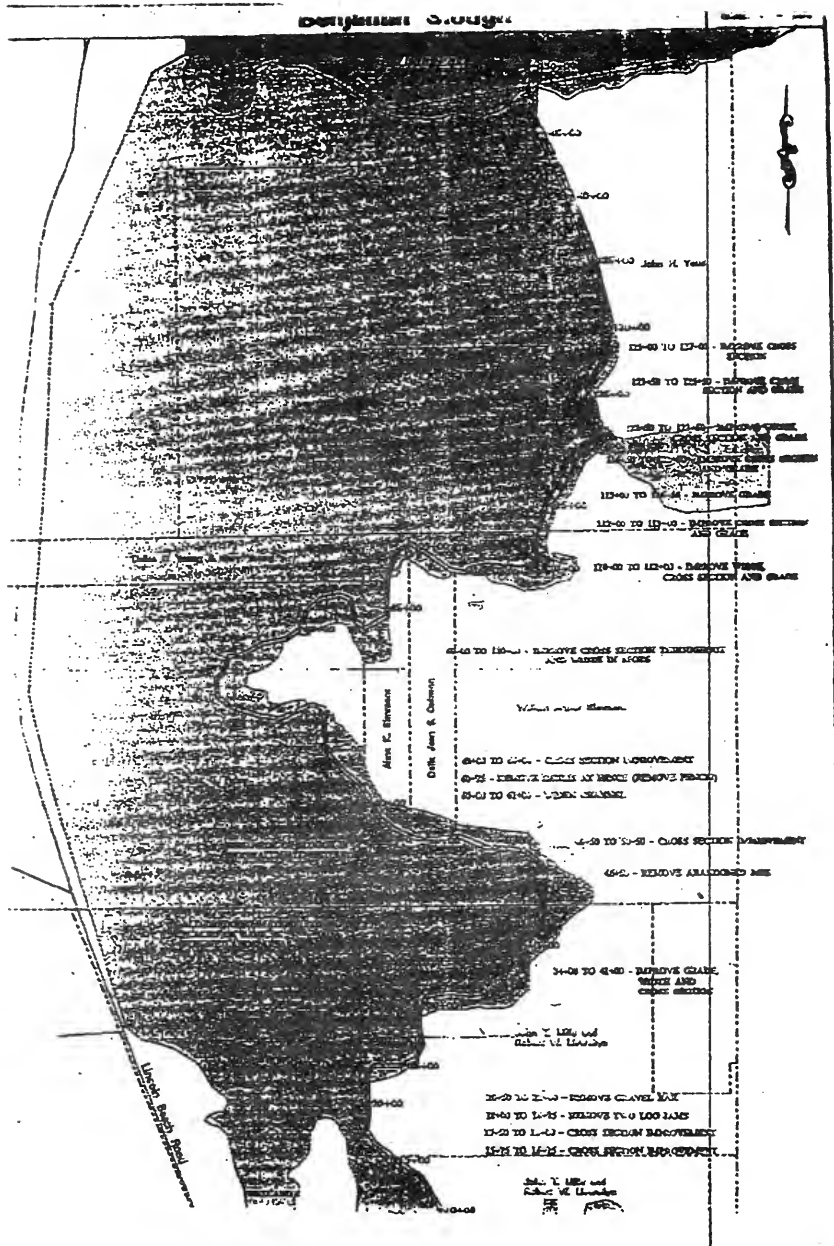
Sincerely,

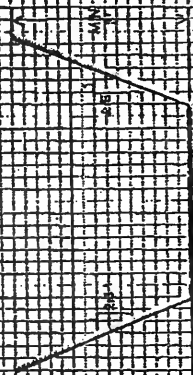


Robert L. Morgan, P.E.
State Engineer

RLM/gcm

pc: Brooks Carter - Corps of Engineers
Bob Mairley - EPA
Bob Freeman - U. S. Fish & Wildlife
Jim Dykman - State History
Carolyn Wright - State Planning
Jim Riley - Regional Engineer
John Fairchild - Regional Wildlife Habitat Manager
Bill Bradwisch - Aquatic Habitat Coordinator
Wayne Martinson - Audubon Society
Wayne C. Anderson - Adjacent Property Owner
Tom Halladey - Adjacent Property Owner



Benjamin Slough: Ideal Cross Section



National Audubon Society

544 Cortez St.
HEBERT AVENUE, SALT LAKE CITY, UTAH 84103
(801) 353-2113

Feb. 24, 1995

Bob Morgan
State Engineer
Division of Water Rights
Department of Natural Resources
1636 West North Temple, Suite 220
SLC, UT 84116-3156

Dear Mr. Morgan:

SUBJECT: Actions Requested Due to Inappropriate Dredging of Benjamin Slough - Stream Channel Alteration No. 93-53-01SA

In a letter dated Dec. 21, 1993, I wrote a letter requesting denial of Stream Channel Alteration Permit No. 93-53-01SA, Benjamin Slough. On Jan. 25, 1994 I requested reconsideration of the permit. I was informed on Jan. 28, 1994 that the request for reconsideration was denied and on Jan. 11, 1995 I was informed that the permit had been extended to March 1, 1995. I was dismayed that the dredging was permitted and extended.

But now the dismay has turned to anger. The dredging recently occurred. But worse, I have been informed that it happened without the proper oversight and with the fill material being placed into the wetlands. Let me ask - How could this happen? There has been substantial attention paid to this potential dredging. I do not believe that anyone could simply say the inappropriate dredging was due to benign neglect. This seems to be a goof beyond simple innocence. To me, this feels like willful negligence. Perhaps, I overstate the case. Certainly, I don't know all of the facts. But this incident is very disheartening to me.

I ask four things:

1. Utah County be made to repair any damages to the wetlands and that they be made to assure they dredged according to the permit.
2. Utah County provide mitigation and/or penalties for this violation.
3. That you not even accept or consider permits regarding dredging or enlarging of Benjamin Slough in this area for a long time. I would suggest ten years. In my mind, this was a breach of confidence that warrants such action.
4. That you provide a letter to me by April 1, 1995 to inform me of your decisions regarding the three requests provided above.

I would be happy to talk to you further and work with the appropriate parties in order to bring some resolution to this problem.

Sincerely,

Wayne Martinson
Wayne Martinson
Utah Wetlands Coordinator

Brooks Carter, Army Corps of Engineers
John Fairchild, Regional Wildlife Habitat Manager
Bob Freeman U.S. Fish & Wildlife
Drusus Macinas, Army Corps of Engineers
Bob Mairley, EPA Region 8
Greg Madenka, Division of Water Rights
Clyde Taylor, Utah County

MT. TIMPANOGOS AUDUBON SOCIETY
P.O. Box 1332
OREM, UTAH 84057



January 24, 1984

Robert Morgan, Director
 Division of Water Rights
 Department of Natural Resources
 1636 West North Temple, Suite 220
 Salt Lake City, Utah 84116-3156

Dear Mr. Morgan:

Re: Stream Channel Alteration Permit Number 93-53-01SA to enlarge and dredge the Benjamin Slough Channel

We write on behalf of the Mt. Timpanogos Audubon Society to ask that you reconsider your decision in granting Utah County's application to dredge Benjamin Slough. According to newspaper articles, the application was occasioned by the rising ground water level in the Benjamin and Lake Shore areas of Utah County.

An examination of the land will show that there are large, deep drains running north and south located in the area west of the town of Benjamin and east of Benjamin Slough. Are these drains being properly maintained and are they performing as they should to regulate ground water levels in the locations currently experiencing trouble? If not, it would seem that the logical solution should be to bring existing drains to full design performance before considering any other action. The permit itself (per.#) expresses doubt that the project "will accomplish what is desired because of the physical constraints of Utah Lake and the low elevation of the Slough area."

The Central Utah Project Completion Act, Section 306, provides for a Utah Lake Wetlands Preserve, and refers to a map which identifies areas in Benjamin Slough as being part of the Wetlands Preserve. Further, SEC. 201(p)(2) specifies water development projects which are not to be funded, and includes the "draining of Benjamin Slough".

The documents available in the office of the Utah County Engineer do not show what lands are intended to be improved by the deepening and straightening of Benjamin Slough. The lands adjacent to Benjamin Slough are wetlands, and are so identified on the map referred to in the Central Utah Completion Act. They are among the lands authorized for purchase by the OWRCA. Congress authorized the appropriation of almost 17 million dollars for the acquisition and management of lands for the Utah Lake Wetlands Preserve.

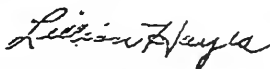
Robert Morgan
Page Two
January 24, 1994

The Central Utah Water Conservancy District has formed a team to make recommendations concerning the Wetlands Preserve. Members of the team include officials from the Utah Division of Wildlife Resources. The team stated that pools in streams are essential as resting places for fish and fowl. Dredging and straightening Benjamin Slough will destroy the resting places and make the stream less habitable for fish and fowl. Also, the team has stated that sinuosities will have to be put back in place where dredging has removed them.

If it is accepted that dredging is bad for fish and fowl, then it is important to know who will be benefitted by the dredging and by how much. With all of the expertise available to the Department of Natural Resources, the benefits to be achieved ought to be quantified.

We believe that the proposed dredging will be destructive to the wetlands and the wildlife habitat that it provides. We respectfully request that you reconsider your decision to allow the enlargement and dredging, and withdraw the permit.

Respectfully,



William Hayes

Mr. Timpanogos Audubon Society

Jeff Appel - UOYOC
Wayne Martinson - Wetland Coordinator - National Audubon
Pat Briggs - Utah Audubon Council
Robert Turner - National Audubon Society
Robert Bob Mairley - EPA
Brooks Carter - Corps of Engineers
Bob Freeman - U.S. Fish & Wildlife
Jill Upman - State History
Gael Quinley - Division of Water Rights/Dam Safety
Jim Wiley - Regional Engineer
Clyde Maylor - P E - Utah County

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Thursday, January 18, 1995

Spanish Fork, Utah 84601

BANG
THURS.,
GET YOUR TIX
CALL 79:

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County approves slough project

Utah County Commission voted this week to dredge Benjamin Slough, which is the end of Utah Lake.

Because of environmental problems with the slough, the commission gave out \$27,500 to fund the project. The project is supposed to solve possible flooding problems in the Shore and Benjamin areas. The project was put off last year when bids came in 10 times higher than county officials anticipated. County officials feel that if they can

begin the project while the ground is still frozen the costs will go down.

County officials said that soft soil would increase the timetable for the project and make its budget soar. The County considered undertaking the project after 1993 when more than 800 acres in the south county were flooded by drainage from nearby Bear Creek. Farmers in the communities were unable to plant crops and the area became a breeding ground for mosquitoes.

The commission has rejected a proposal to construct a canal east of

the two unincorporated communities with a steeper grade to carry runoff to Utah Lake. That proposal was rejected because officials felt it would be too expensive.

The County still faces opposition from environmental groups however including the local Audubon Society. That group reminded the commission that the entire area around the slough has been designated as wetlands by the U.S. Department of Fisheries and Wildlife.

Members of the society are still considering filing suit to stop any

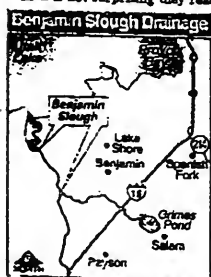
dredging claiming it could disrupt the slough's natural waterfowl habitat. They also said that permits obtained from the state do not allow dredging in wetland areas.

The work will be done by the U.S. Army Corps of Engineers, which usually oversees wetlands, and will have little or no impact on the environment if it is done during winter. The permit will allow for dredging two 1,500 foot sections where the channel is obviously backing up.

Drainage Project Dredges Up Conflict

By Mike Gorrell
THE SALT LAKE TRIBUNE

Farmer Marion Sorensen distills geese as much as Audubon Society member Lillian Hayes adores them. So it is not surprising they reacted differently to Utah



The Salt Lake Tribune

County's dredging work last week on the Benjamin Slough (pronounced *slaw*), a fast-flowing drainage channel that empties into a southeastern bay of Utah Lake. For Sorensen, a Pelmyra resident, dredging is the only way to keep the slough functioning properly, carrying drainage water to Utah Lake from the area between Spanish Fork and Payson. Otherwise, runoff overwhelms the channel and backs up several inches deep over nearly flat terrain along the lake shore. The shallow water attracts geese and other birds and prevents Sorensen from growing hay for his cattle. "I'd like to get rid of the geese. We have 300 to 1,000 there practically every day. They're a total menace," he said. "If I liked to eat them, I'd shoot them. But I don't like geese meat."

■ See CONFLICT, Page D-3

Conflict Stems From Dredging Work

■ Continued from D-1

Hayes is appalled by anything that disrupts wetlands, which have been used by migratory birds and raptors long before farmers arrived.

"It would be nice to keep the wetlands the way they are," she said, noting reverentially that she saw two marsh hawks and numerous geese while inspecting the dredging sites last Sunday.

"We ought to get the cattle out. We should be able to work out something, like a land exchange where we could find more suitable grazing land for cattle. It really is a conflict between cattle and the birds."

The excavation work done quickly last week culminated efforts by local, state and federal officials to find a compromise to the incompatible intermingling of wildlife and livestock.

While more dredging was done than Hayes wanted, it was too little, too late for Sorensen.

"It's really distressing," Hayes said. "They lowered the water table by more than a foot. That is exactly what we didn't want."

Countered Sorensen: "It should have been done three years ago. But you have all the bureaucrats who know more about what we need than the people who live along the land."

Those bureaucrats work for a number of agencies that have varying degrees of oversight responsibility for wetlands projects.

At the local-government level, Utah County Engineer Clyde Naylor took up the cause of farmers and homeowners whose properties were becoming waterlogged with water backing up from the narrow, shallow slough.

His application to the Utah Division of Water Rights for a stream-alteration permit was approved a year ago. But the county was allowed to dredge only two

stretches of the slough where the outback was worst.

The restriction was imposed after the Utah Division of Wildlife Resources, U.S. Fish & Wildlife Service and U.S. Army Corps of Engineers expressed concern that too much dredging could damage the wetlands. They agreed it would be done only if it was sure it was done right.

Utah County put the project out to bid almost a year ago, but no work was done. Low bids were more expensive than anticipated partly because the ground had thawed. The additional time needed for backhoe to work in much bogged costs sharply.

Meanwhile, River Mount Timpanogas Audubon Club and the Stoney Society chapter of Trout Unlimited filed a lawsuit against the Utah Division of Water Rights. They claimed the division's analysis of the impact on the natural stream environment and endangered wildlife was inadequate and incorrect.

The still-pending lawsuit did not seek an injunction to prevent the county from doing the work, however. So last week, a bellows rumbled over ground solidified by cold temperatures and excavated the sections.

Word that the dredging was done surprised Druze Machness of the U.S. Army Corps of Engineers and Greg Mlenka of the Utah Division of Water Rights. Both expected to be notified when work began, although it was not a legal requirement.

Jane Allen, a Salt Lake City attorney representing the Audubon and Stoney societies, also was unaware of the work. She said Utah County could end up paying more money to repair the channel or develop replacement wetlands — if it loses the case.

Naylor is aware of that possibility, but not concerned.

His optimism probably is not misplaced, said John Fairchild, a Utah Division of Wildlife Resources habitat manager. Although Wildlife Resources initially was concerned about dredging, Fairchild says the project's limited scope makes it acceptable.

"It will have some impact, but it's not significant. It's not going to destroy the area for wildlife."

Letters

Dredging a bad move

One would think that the State of Utah and Utah County would not be involved in the draining of a Federally-established Wetlands Preserve. One would be wrong.

The Central Utah Completion Act — Section 306(c) established a Wetlands Preserve in a portion of Benjamin Slough which drains into Utah Lake near Lincoln Point.

The Act authorized the appropriation of \$16,690,000 to acquire land and water and to develop and preserve a Wetland Preserve in Benjamin Slough and Goshen Bay.

According to the Act, the Preserves were to be managed by the Utah Reclamation and Conservation Commission in cooperation with the Utah Division of Wildlife Resources and the United States Fish and Wildlife Service. A preliminary draft for an acquisition and management plan for the Wetlands Preserve was prepared and issued by the Utah Division of Wildlife Resources on Sept. 30, 1994.

Recently, acting by reason of a permit issued by the Utah State Engineer, Utah County contracted for the dredging of Beer Creek in the lower part of Beer Creek which is located in the Benjamin Slough Wetland Preserve. The dredging has been accomplished under the direction of the Utah County Engineer.

In a recent conversation with the County Engineer, he reported that thus far the dredging had reduced the water level in the dredged area by approximately one foot.

If the dredging of wetlands bordering Beer Creek represents the measure of dedication of the Central Utah Water Conservancy District, the State of Utah and the United States Fish and Wildlife Service to the provisions for mitigation of the Central Utah Completion Act, future CUP appropriations would be fitting items on which a President should exercise a line item veto.

Lillian Hayes

Mr. Timpanogos Audubon Society
Provo

the PRWUA get away with murder — literally.

Now the BOR is going to start the Otto Otter program through the local school system, hoping to improve safety. What a smoke screen. What about the pre-schoolers who are probably the most at risk? They don't attend school, they often don't understand everything they're told; and even if they did understand, they don't always have the self-control or thought processes necessary to make a good choice.

Ed Vidmar of the BOR is quoted as saying that gates and fences are only an "illusion of safety." I disagree. Gates and fences are real and tangible. Bumping into a gate will keep my 2½-year-old away from the canal, but my words can be ignored.

From what I read, the Otto Otter program will only be implemented in Orem. What about the kids in Provo, Lindon, Pleasant Grove, etc.?

I happen to live below the canal in Lindon, just yards from where the canal bank broke in the spring of 1988. I can look out almost any window in my house and see what's happening around the canal. You wouldn't believe some of the things I've seen — most are against the law. A locked gate on the canal would not keep all the lawbreakers out but certainly would curb some of the activity there, which can only be a positive thing for the safety of the canal banks.

I've also seen the PRWUA workers in "action." Most of them are older men and rarely get out of their pickup trucks.

Maybe I've missed something, but from what I've seen, the BOR and the PRWUA are not concerned about the children who live near the canals, and Ed Vidmar could teach a class in how to talk a lot without saying anything. Maybe he should become a politician.

Cynthia Toombs
Lindon

The Salt Lake Tribune COMMENTARY

Sunday, February 19, 1995

Dredging Violated Preserve

One would think the state and Utah County would not be involved in the draining of a federally established wetlands preserve. One would be wrong.

The Central Utah Completion Act established a wetlands preserve in a portion of Benjamin Slough, which drains into Utah Lake near Lincoln Point. The act authorized the appropriation of \$16.7 million to acquire the preserve in Benjamin Slough and Goshute Bay.

According to the act, the preserves were to be managed by the Utah Reclamation and Conservation Commission in cooperation with the Utah Division of Wildlife Resources and the U.S. Fish and Wildlife Service. A preliminary draft for an acquisition and management plan for the wetlands preserve was prepared and issued by the Utah Division of Wildlife Resources Sept. 30, 1994.

Recently, acting by reason of a permit issued by the state engineer, Utah County contracted for the dredging of the lower part of Beer Creek, which is located in the Benjamin Slough Wetland Preserve. The dredging has been accomplished under the direction of the Utah County engineer.

In a recent conversation with the county engineer, he reported that thus far the dredging had reduced the water level in the dredging area by approximately one foot. If the dredging of wetlands bordering Beer Creek represents the measure of dedication of the Central Utah Water Conservancy District, the state and the U.S. Fish and Wildlife Service to the provisions for mitigation of the Central Utah Completion Act, future CUW appropriations would be fitting items on which a president should exercise a line-item veto.

LILLIAN HAYES
Mt. Timpanogos Audubon Society
Provo



**CITY - COUNTY
HEALTH DEPARTMENT
OF UTAH COUNTY**

Joseph K. Miner, M.D., M.S.P.H.
Executive Director

DIVISION OF MOSQUITO ABATEMENT
Linda J. Marrett, R.S., Director

2855 South State Street - Provo, Utah 84606
Phone (801) 370-8637 - Fax (801) 370-8612

WETLANDS MANAGEMENT

1995 POLICY STATEMENT

The Utah County Mosquito Abatement Division supports the need for conservation and management of wetlands that gives due consideration to preventing the spread of human disease, and favors the continued development of technology that permits public health concerns and production of pest mosquitoes to be addressed while protecting wetlands. The Utah County Mosquito Abatement Division encourages public education about wetlands and emphasizes that all future wetlands legislation should address disease vector/public health issues. Public health and safety cannot be jeopardized in favor of private property rights while preventing the spread of disease and guaranteeing a health environment for all.

Utah County Mosquito Abatement Division

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Daily Herald

50 cents

Property owners score win against environmentalists

By H. JOSEF HERBERT
Associated Press Writer

WASHINGTON — Property owners could seek billions of dollars for losses caused by restrictions on the use of environmentally sensitive land under a bill passed by the House on Friday.

The property rights bill, which passed by a 277-148 vote, was hailed by supporters as long-awaited relief for landowners who have property devalued because of wetlands protection or rules sheltering endangered species.

The bill will rein in "a bureaucracy out of control and running amok," declared Rep. Richard Pombo, R-Calif. "We want to restore the power of the people having to live under this."

The measure was the last of a string of anti-regulation bills passed this week by the House under the GOP's "Contract With America" banner.

The other bills include measures that would require the federal government to pay more attention to costs and compare risks against benefits when issuing regulations, especially those dealing with the environment, and make it easier — especially for small businesses — to challenge federal regulations.

It was unclear how the bills will fare in the Senate, where it is easier for a small group of lawmakers to block legislation. More modest property rights and risks assessment bills have been introduced in the Senate, but have yet to be debated.

"We hope they will not weaken (the House-passed measures). This is a strong anti-regulation package," House Republican Whip Tom DeLay of Texas said at a

news conference.

Environmentalists predicted that if the House bill survives in the Senate it could amount to destroying wetlands and endangered species protection laws because agencies would be reluctant to press enforcement, fearing compensation claims they could not afford to pay.

Called the "Private Property Protection Act," the House-passed measure would broaden substantially the definition courts traditionally have given to a "regulatory taking" of property.

It would require a federal agency to compensate landowners if a federal action to preserve ecologically sensitive lands — such as wetlands or endangered species rules — reduces the land's value by 20 percent. Courts have generally ruled that a government "taking" occurs when all value of a property is lost.

Originally designed to cover all regulations, supporters during two days of floor debate agreed to narrow it to cover only federal actions taken to protect wetlands and endangered species, and rules involving federal water rights.

The water provision was included to gain support of many lawmakers from the West, where water rights are crucial and considered property. A rancher could seek compensation if the Interior Department takes water away from him and shifts it for urban use.

"People believe government no longer is their servant — it's their master," said Rep. Billy Tauzin, D-La., one of the most vocal advocates for property rights legislation in the House.

PREPARED STATEMENT OF CENTRAL UTAH WATER CONSERVANCY DISTRICT

Chairman Hatch, my name is Gene Shawcroft, and I am the Assistant General Manager of the Central Utah Water Conservancy District. Don Christiansen, the District's General Manager sends his thanks for being asked to testify and his apologies for not being able to be present personally. He has asked me to officer this brief statement of support for this important legislation.

The Central Utah Water Conservancy District applauds your efforts and those of Senator Dole and the many other cosponsors of the Omnibus Property Rights Act. This legislation is fundamental to providing the full protections embodied in the provisions of the Constitution guaranteeing to each individual that his property may not be taken by government action without due process and just compensation. I am certain this Committee has heard numerous examples of how intrusive environmental regulations have denied a property owner the full benefit and enjoyment of his property. I am pleased today to be able to add the support of the Central Utah Water Conservancy District to the enactment of this important legislation. If I may, I would like to take a minute to suggest an area where the bill might be strengthened with respect to water rights and the doctrine of western state water law primacy.

In the eastern half of the country, where water is an abundant resource, water law and water rights are based upon the riparian doctrine. Under the riparian doctrine, water rights run with the land and are attached to real property when it is sold from one owner to the next. Under riparian water law, the owner of real property also owns the water attached to it.

In the western United States, water is a scarce and limited public resource which is used over and over again by one downstream user after another. We westerners follow the doctrine of prior appropriation in water law. Western water rights generally follow a rule of first in time, first in right. The right to use water does not, however, convey the right to own water.

Under the prior appropriation doctrine the "right" to use water does not run with the land nor is it associated with real property at all. As you know there are many stories of fraudulent desert land developers who sold property to easterners without any water rights attached to it.

Under western water law, the "right" to use water is regulated by the state water engineer who determines when, where, and how much water may be put to beneficial use by any individual. Western water rights issued by the state usually always have conditions placed upon them which burden their use.

Local governments often enact ordinances which further restrict an individual's right to use water during times of drought or for public health and safety purposes. In addition, the State Engineer will sometimes "adjudicate" the rights of a river system where there are many competing water right holders. Often after an adjudication, there are some disgruntled water right holders whose prior usage has been reduced.

Finally, when a water development project like the Central Utah Project is overlaid on top of preexisting projects such as the Provo River Project or the Strawberry Valley Project, there is a need for the State to obtain an operating agreement which will coordinate the projects water supply to produce more efficient use of the resource.

Due to the completion of Jordanelle Reservoir, such an operating agreement was negotiated last year for the Provo River system and was brought about with the assistance of the Bureau of Reclamation and the State of Utah. This important agreement provides for the coordinated use of Jordanelle and Deer Creek Reservoirs to maximize the storage and delivery of water and to provide adequate protection of stream flows for fishery purposes.

In the Omnibus Property Rights Act, the definition of "property" and "private property" includes "the right to use and receive water". A prior appropriation water right is not private property in the same manner as a riparian water right. The difference between the nature of riparian and prior appropriation water rights is important as you consider requiring federal, state and local governments to provide compensation for actions taken which reduce the value of such rights.

We believe the bill could be strengthened to provide some differentiation between riparian and prior appropriation water rights. I am certain that the authors of the draft legislation did not intend to create a new federal cause of action for every disgruntled water right holder any time his use of water is in some legitimate way altered such as in the examples I have provided above.

We would be happy to have our Washington, D.C. counsel, Mr. Marcus Faust, whom you know, work with you and your staff to address this issue. Once again, I thank you for asking us to testify. Good luck as you move this bill forward.

PREPARED STATEMENT OF ROBERT C. FILLERUP

During a recent telephone conversation with Ron and Karen from your office, they mentioned that you were interested in cases where wetland determinations had a significant impact on a person's life. I currently represent a client involved in one of these "horror" stories.

Before I relate the story, let me give you some background. I have represented the Utah Lake Landowners Association since the early 1980's. I was the attorney that filed the multi-million dollar lawsuit on behalf of the landowners because of the flooding of Utah Lake in the 1983-5, and was plaintiffs' counsel in negotiating the new compromise agreement of 1985. I currently represent several of these landowners in the condemnation action involving the Provo City Airport expansion. I also currently represent the Utah Lake Landowners in the ongoing settlement negotiations with the State of Utah concerning the ownership boundary of the bed of Utah Lake. As a result of my continued representation of landowners around Utah Lake, I have been forced to become somewhat of an expert on wetlands issues. I tell you of my representation of these folks, not to boast, but to let you know that I am not just casually involved with wetland problems.

And now to the "horror" story at hand. One Wendell Averett, a resident of Springville, Utah owns some 23 acres of land immediately east of 1-15 and just north of the first exit off of the freeway to Springville as you are going south from Provo. This road is known as SR-75, and is the highway that passes by Valtek, Stoffer Foods, etc., on the way to its connection with US-89 at the north end of Springville. Immediately south of the Averett property, across this highway, is a large commercial development, known as Mountain Springs, consisting of a truck stop, hotel, restaurant, an associated businesses. This development is continuing to expand even now.

Wendell has a close friend (in fact his LDS bishop) named Roger Olsen, a real estate agent who for years has specialized in listing and selling farmland through his Utah Farm Realty. Roger became aware of a company interested in purchasing Wendell's property for a commercial development, and on July 15, 1994, Wendell signed an agreement to sell the property for \$30,000 per acre. (\$716,100 total).

In the process of purchasing, the developer inquired whether there were any wetlands problems, since there is an open drainage ditch on the far west end. Mr. Olsen indicated that he didn't think there were any, since the parcel was currently a corn field, but agreed to check with the Corps of Engineers. Upon inquiry, COE informed Roger that the property was not listed as jurisdictional wetlands, but because it was agricultural, he needed to contact the local office of the Agricultural Stabilization and Conservation Service (ASCS). Unfortunately, Roger dutifully complied.

ASCS told Roger that Wendell would have to come in and sign an "AD-1026" form requesting a wetland determination, which Wendell did on August 3, 1994. ASCS then referred the matter to the local Soil Conservation Service (SCS).

Only two days later, on August 5, 1994 the SCS issued its first determination in this matter. (Exhibit A). The determination indicated that there were 10 acres that SCS had decided were wetlands, and the map attached to the determination indicated those areas. By August 8th, Roger was in the SCS office, and according to the SCS file, was questioning the presence of wetlands and the acres identified as wetlands (10 acres) on the SCS-CPA-026." (Part of the record on appeal, attached as exhibit E). Roger could not believe that the areas indicated constituted wetlands, and questioned whether the areas indicated on the map would add up to 10 acres.

SCS then proceeded to do a "redetermination" of its previous determination. The end result was the issuance of a new determination dated September 27, 1994, (but issued September 15th) which indicated that the *entire parcel* had now been determined to be wetlands. (Exhibit B).

Between the time that SCS issued its first determination on August 5th, and its redetermination on September 15th, the Corps of Engineers issued a Public Notice concerning the expansion of the South University Avenue interchange in Provo by the Utah Department of Transportation (UDOT). (Exhibit C). A copy of this notice was sent to Wendell Averett, because part of UDOT's plan included taking Wendell property as a wetland mitigation site. This notice was the first time that Wendell had ever been aware that UDOT was including his property as part of its plan. Its clear from the record that SCS and COE were communicating about Wendell's property between the two determinations and during the issuance of the Public Notice

by COE. I have not established, and probably could not establish, any direct connection between what UDOT and COE had in mind for Wendell's property, and the fact that SCS "redetermined" the entire parcel to be wetlands, but I have my suspicions.

Because of the wetland determination by the SCS, the COE on October 14, 1994, asserted jurisdiction over Mr. Averett's property. (Letter attached as Exhibit D).

In any event, I appealed the wetland determination to the local SCS office, which referred it to the State Soil Conservationist, Mr. Philip Nelson. A copy of that appeal, including the record on appeal, is attached as Exhibit E. As might be expected, Mr. Nelson affirmed the original determination. What was totally unexpected is that Mr. Nelson, without any prior notice to me or Mr. Averett, and without any opportunity on our part to respond, solicited additional information from several agencies to confirm the decision that was being appealed. A copy of Mr. Nelson's decision is attached as Exhibit F.

I have now appealed to the National Office of the SCS (technically now its the NRCS) and a copy of that appeal is attached as Exhibit G.

I believe that reading the appeals, with the documentation attached, should fill in most of the gaps. In addition, the entire record, including photos and maps, could be examined or copied at the national office of the SCS in Washington, D.C. A copy of the acknowledgement of receipt of the appeal is attached (Exhibit H) for reference.

The bottom line of all of this is that Mr. Averett had a parcel of ground which he sold on July 15, 1994 for \$716,100. By the end of September, 1994, because of the wetland determination, the property was worth about \$30,000. This whole affair has made Mr. Averett a nervous wreck, and it is clearly affecting his health. By the way, the buyer has now backed out of the deal.

Thank you,

ROBERT C. FILLERUP.

[EDITOR'S NOTE: Exhibits "A" through "H" are retained in committee files.]

PREPARED STATEMENT OF LON HENDERSON

I appreciate the opportunity you have given me to more fully explain Heritage Arts Foundation's conflicts with the United States Fish and Wildlife Service ("FWS") over the last several years. We believe that our experience provides compelling evidence of the need for prompt passage of S. 605. We very much appreciate Senator Hatch's willingness to co-sponsor this important legislation. Hopefully, S. 605 will pass as easily as the House version did in arch. What follows in this memorandum is a brief description of Heritage Arts foundation ("HAF") and its disputes with FWS over application of the endangered Species Act to property owned or used by HAF.

HAF is a nonprofit corporation qualified under Section 501(c)(3) of the Internal Revenue Code HAF's primary purpose is to support the performing arts by providing facilities and other funding for arts education, artistic performances, and related community activities. HAF recently completed construction of the Tuacahn School and Performing Arts Center ("Tuacahn") on an 80-acre site near the City of Ivins in Washington County, Utah. Tuacahn cost over \$18 million to construct, and includes an outdoor amphitheater and a complex of buildings and indoor stages where performing artists can be trained, rehearse, and perform. The funds for construction came almost exclusively from private donations.

Prior to commencing construction of Tuacahn, HAF commissioned a biological survey of the 80-acre construction site to determine whether there was evidence of ally species protected by the endangered Species Act. The primary target of this survey was desert tortoises. Desert tortoises are protected by the Endangered Species Act. See 16 U.S.C. §§ 1531-1544. They inhabit vast areas of the Southwestern United States, including parts of California, Nevada Arizona, and Southern Utah. There are an estimated 7,883 desert tortoises inhabiting Washington County, Utah alone. The biologist conducting the survey found no evidence of desert tortoises or other protected species at the construction site. However, during the construction of Tuacahn, HAF and FWS exchanged several letters concerning the potential risk of harm to desert tortoises due to HAF's use of a 1¼ mile unpaved access road which leads from Snaw Canyon state Park Road to the Tuacahn site. That road is not owned or controlled by HAF.

As a result of those letters, HAF took steps to protect tortoises from harm during construction. Unfortunately, after about a year and a half of construction and use of the access road, two dead tortoises were found on the access road in May 1994. HAF promptly notified FWS after discovering each tortoise, Despite FWS' knowledge of HAF's use of the access road, FWS elected to vigorously prosecute HAF

under the Endangered Species Act. FWS divulged that it was prepared to completely shut down construction at Tuacahn, despite the millions of dollars in funds already expended and the possibility that construction would not resume for an indefinite time due to scheduling conflicts with the contractors working at the site. Indeed, as a result of FWS' actions, HAF was compelled to request the City of Ivins to shut down the access road to motorized traffic, which Ivins did. HAF was also forced to hire expensive legal counsel to advise it on how to proceed,

After months of intense negotiations, HAF and FWS entered into a court-approved Stipulated settlement. The settlement provided that, as restitution for the two dead tortoises, HAF would pay a \$20,000 penalty and immediately prepare and submit an "incidental take permit" application to FWS—despite the fact that a county-wide conservation plan was then pending with FWS which would have permitted incidental "takes" of desert tortoises along the access road. Until the "incidental Lake permit" is issued, HAF must disseminate flyers about desert tortoises to all users of the access road and retain a biologist to conduct additional biological surveys searching for signs of desert tortoises. The settlement also required installation of a special tortoise fence along the access road and employment of trained tortoise monitors to walk along the road to ensure that tortoises did not venture onto the road or become entangled in the fence. If a tortoise is found along the access road, HAF is required by the settlement to close the road and contact a FWS-approved biologist to investigate the incident at HAF's expense and make recommendations to avoid future mishaps.

After great cost, time, adverse publicity, and emotional anguish, HAF was permitted to resume construction and complete the Tuacahn facilities. Some have speculated that FWS chose to "single out" HAF for especially harsh treatment in order to force other Washington County land-owners into additional concessions to be written into the Washington County conservation plan. We have no hard evidence of this, but we do feel that our activities have been subjected to unusually close scrutiny by FWS.

For a time, HAF seriously considered pursuing this matter in court. We felt and continue to feel that FWS' proposed injunction, which would have shut down all use of the access road and would have effectively ended the dreams of many, would have constituted a regulatory "taking" of HAF's property by the federal government without just compensation as required by the Fifth Amendment. In our view, FWS' action, if successful, would have denied HAF economically viable use of its property, thereby requiring compensation. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

However, due to the costs and time involved in fully pursuing such litigation, HAF elected instead to enter into the Stipulated Settlement described above. HAF had also been advised by legal counsel that such a court battle, even if waged, may not have been successful. As you may know, no property owner has ever successfully claimed that an application to the Endangered Species Act which reduces or eliminates the economic value or possible uses of private property constitutes a "taking" under the Fifth Amendment. See R. Meltz, "ESA & Private Property: Where the Wild Things Are: the Endangered Species Act and Private Property," 24 *Envtl. L.* 369, 385 (1994). Moreover, HAF feared a result as puzzling as that in *Christy v. Hodel*, 857 F.2d 1324 (9th Cir. 1988), in which a property owner, after losing 20 sheep to grizzly bears, shot one of the bears and was fined \$2,500 by FWS for violating the Endangered Species Act.

Precisely because HAF felt so helpless to prevent a result which deemed manifestly and profoundly unjust, we fervently hope that S. 605 passes. If S. 605 would have been law during our confrontations with FWS, we would have had an avenue to pursue that would have guaranteed that our property rights would have been protected. I would be happy to discuss these matters further with you. Please feel free to call me at (801) 674-7100.

OCTOBER 18, 1995

PREPARED STATEMENT OF SENATOR DIANNE FEINSTEIN

Mr. Chairman, when we legislate in the area of property rights, we need to approach the responsibility with the sensitivity that the difficulty of the task deserves. Individual rights should be honored and protected. But our task also includes promoting public health, public safety, and protecting the environment.

I plan to give very serious consideration to the concerns of property owners when I look at the ways our various federal statutes are structured and enforced. But I oppose this bill, because I believe that it is an extreme and costly measure that would open the floodgates of litigation and cripple the federal government in its efforts to create safer and healthier communities for all its citizens.

A free-standing "takings" bill such as S. 605 represents the wrong approach to protecting the rights and interests of property owners in the United States. Many years of Supreme Court jurisprudence have shown us that takings questions should be resolved on a case-by-case basis. Landholdings are unique, statutory and regulatory programs differ in their purposes and application, and impacts on property owners vary widely. As even the most conservative Supreme Court Justices consistently have held, a balancing of several factors is required to determine when "fairness and justice" requires government compensation under the 5th Amendment.

In short, "one-size-fits-all" takings legislation such as S. 605 will stimulate speculative claims, create endless litigation, and cripple federal agencies.

The Clinton Administration already has begun to examine federal programs to better accommodate landowners, particularly small landowners. This Administration has made great strides in building more flexibility into the Endangered Species Act and the wetlands program of the Clean Water Act. I urge the Administration to continue on this path. If there are areas where the federal government has been overbearing, we need to study these cases. We need to gain a better understanding of the kinds of situations that give rise to valid takings claims, and to work to find solutions on a program-by-program basis. At the same time, we cannot tilt the scales entirely in favor of individual property owners—we cannot sacrifice programs that protect the health and safety of our communities.

I. WHO WILL PAY FOR S. 605

The bill requires that funds for a vastly-expanded number of takings judgments should be withdrawn from individual agency appropriations. Where will this money come from?

- Discretionary spending is scheduled to reach its lowest level as a percentage of GDP since World War II. The appropriations bills proposed by the current Congress would cut \$441 billion from discretionary spending over the next seven years.
- According to the Office of Management and Budget (OMB), "[s]ince the costs (of S. 605) would fall under PAYGO provisions of the Budget Enforcement Act, [expected costs for takings payments] could prompt a sequester of other mandatory programs, forcing automatic across-the-board cuts in medicare, veterans' readjustment benefits, various programs that provide grants to states, child support administration, farm income and price supports, agricultural export promotion, student loans, foster care and adoption assistance, and vocational rehabilitation."

Legislation such as S. 605 would have the effect of limiting still further the funds available for crucial governmental services. It will involve tradeoffs, substantial tradeoffs, to the extent that I am unwilling to endorse.

Furthermore, Federal takings legislation, if passed, would serve as a precedent for the enactment of similar legislation at the State and local levels.

Future State or local takings legislation could seriously undermine important planning tools such as zoning laws and setback requirements. County and municipal governments, already strapped for funds, would be forced to withdraw funding for other important programs.

It is no wonder that takings legislation like S. 605 is opposed by organizations such as the National League of Cities, the American Planning Association, the National Governors Association, the National Conference of State Legislatures, thirty-three State Attorneys General, the United States Conference of Mayors, the National Trust for Historic Preservation, the Consortium for Citizens with Disabilities, and the National Institute of Municipal Law Officers.

II. S. 605 WOULD JEOPARDIZE PUBLIC HEALTH, SAFETY, AND ENVIRONMENTAL LAWS, AND CERTAIN U.S. MILITARY OPERATIONS

I will give you some examples of the many important Federal programs that could be jeopardized by legislation such as S. 605.

In a letter to this Committee, the Secretary of Agriculture listed various USDA programs that could be undermined by S. 605, including USDA controls on the movement of plants and animals to eradicate pests and diseases.

In addition, because S. 605 would require USDA to pay for takings judgments out of its own appropriations, the Secretary noted that "[p]rograms funded as entitlements like the commodity price stabilization programs, would be open-ended sources of funding for compensation claims."

The Secretary of Health and Human Services, in a letter opposing S. 605, listed the following governmental functions that could be jeopardized by S. 605:

- recalls or seizures of adulterated or misbranded foods, drugs, and devices;
- injunctions against manufacturing or health care facilities for creating safety hazards;
- federal regulations raising the minimum quality standards for mammography facilities;
- federal regulations raising the standards of nursing homes for participation in Medicare and Medicaid.

Programs of the Department of Transportation (DOT) that could be threatened by S. 605 include:

- Federal Aviation Administration safety initiatives, including airworthiness directives prohibiting the operation of certain types of aircraft in unsafe conditions;
- Federal Highway Administration "out-of-service" orders requiring motor carriers to cease using vehicles that pose imminent hazards to safety;
- DOT facility compliance orders requiring the shut-down of liquid and gas pipelines until problems have been corrected.

According to the Department of Defense, S. 605 could hamper several kinds of military operations including:

- Aircraft overflights;
- Efforts to keep waters navigable for the Navy, including disapproval of construction of certain piers, wharves, or bridges;
- Base closures.

Several important Federal programs already have been challenged as takings. Although the following cases, and a range of others, have lost in the courts, cases such as these would be likely to win under S. 605:

- A firearms importer challenged the Gun Control Act's provision banning the importation of assault rifles as a taking.
- A restaurant franchisee claimed that requirements of the Americans With Disabilities Act to provide bathroom facilities for the disabled constituted a taking.
- A group of doctors challenged as a taking a Medicare program restriction on how much participating physicians could charge their patients.

III. S. 605 REPRESENTS THE WRONG APPROACH TO PROTECTING PROPERTY RIGHTS

(A) *Overbroad definition of "property"*

S. 605 defines property to include: real property, property defined by contract, including "rights to use and receive water," and "any interest understood to be property under common law."

- This could mean that California's recent Bay Delta accord, which took two decades to attain, would be threatened. The accord is a landmark agreement among major California water interests that adjusts the allocation of significant quantities of water to protect the resources of the San Francisco Bay. S. 605 could also hamper efforts to clean the Kesterson Reservoir in California's Central Valley. If the bill were to become law, the Bureau of Reclamation would have to compensate farmers when it reduced the volume of subsidized irrigation water in order to remedy serious pollution resulting from irrigation return flows. S. 605 also could require the Bureau of Reclamation to compensate landowners every time it reduced water flows in times of drought.

(b) Automatic "loss of value" test

S. 605 would employ an automatic "diminution in value" test to determine whether a taking has occurred. The Supreme Court traditionally has decided fairness questions by balancing individual interests with community values and needs. This includes consideration of the specific property interest at issue, the regulation's nature and economic impact, the property owner's legitimate expectations, and the public interest protected by the regulation.

S. 605 does not provide for balancing. Compensation would be provided *solely* on the basis of the *economic impact* of the regulatory action, without considering fairness—fairness to the community as well as the individual.

If the bill's diminution in value threshold is met, compensation must be paid, regardless of the price the owner paid for the property, the expectations the owner had when acquiring property, or whether the owner is able to earn a reasonable rate of return on the property.

And S. 605 would provide incentives for speculative claims. For example, a landowner with no intention to fill a wetland, or no intention to construct buildings on farmland property, could nevertheless bring a takings claim and win.

(c) Low threshold for takings claims

Under S. 605, a 33 percent reduction in value of any portion of the affected property would automatically trigger a taking. Because any regulation that restricted the use of property in any way would completely "take" some portion of the property, takings plaintiffs would win in nearly all cases.

Years of Supreme Court decisions have measured diminution in value by looking at the owner's property as a whole rather than the "affected portion" of the property. Where is a judge to draw the line in determining what constitutes the "affected portion?" How will a judge determine whether the value of an "affected portion" has been diminished by 33 percent? A pre-determined standard such as this is simply unworkable.

(d) Takings impact analysis, look-back and re-opener provisions

S. 605 would require all federal agencies to prepare a "taking impact analyses" (TIA) before issuing any regulation, policy, proposed legislation, or "related agency action" that is "likely" to result in a taking. This means that a TIA would be required for any agency action that is "likely" to result in a 33 percent reduction in the value of an affected portion of property. Legal challenges to a TIA would be permitted for 6 years after submission. Government actions therefore would be tied up in court, and agencies would incur the litigation costs.

S. 605 also would prohibit agencies from promulgating final rules if enforcement "could reasonably be construed" to require an uncompensated taking as defined under the bill.

The bill also contains "look-back" or "re-opener" provisions, requiring agencies to review existing rules that "result in takings" under the Act.

This goes beyond protecting property rights. This is a formula for agency gridlock. S. 605 would prevent agencies from doing their jobs, jobs the American people have asked them to do.

(e) S. 605 would upset established Federal-State relationships and successful Federal-State partnerships

The bill creates Federal liability for State actions carried out as part of Federal regulatory programs, delegated by Federal regulatory programs, or carried out by State agencies receiving Federal funds in connection with a regulatory program. In other words, S. 605 could require the Federal government to pay for State actions, even in cases where it does not approve of such actions. This will encourage the Federal government to give the States less autonomy in the future, and will run counter to the states-rights goals of the current Congress.

IV. ADMINISTRATION EFFORTS TO PROTECT SMALL LANDOWNERS

As I noted earlier, the Clinton Administration already has proposed and/or implemented reforms under the ESA and Section 404 of the Clean Water Act to better accommodate small landowners. The Justice Department has been working on Alternative Dispute Resolution mechanisms to save property-owning plaintiffs from cumbersome litigation.

EPA's wetlands program modifications and proposals include:

- a proposed, simplified administrative appeals process which would allow landowners to appeal wetlands identifications and permit denials without costly and time-consuming court battles;

- a simplified wetlands identification program, and increased certainty for permit applicants;
- simplified procedures by which landowners can affect up to one-half acre of non-tidal wetlands for construction of single-family homes without applying for individual Section 404 permits;
- simplified procedures for adding to existing structures on wetlands properties;
- a streamlined Section 404 permit process;
- increased State, local, and Tribal roles in protecting wetlands resources;
- a simplified wetlands mitigation banking process, to allow property owners to more easily offset certain wetlands losses by restoring or enhancing other wetlands.

The Department of the Interior has instituted a number of reforms to the Endangered Species Act (ESA), and has made legislative recommendations that would further improve the Act and its implementation. These include:

- exemptions for small landowners from rules relating to threatened species;
- increased State roles in ESA implementation;
- exemptions for designated small timber interests from certain ESA regulations relating to the Northern Spotted Owl;
- a "no surprises" policy for previously-approved Habitat Conservation Plans. Under this policy, property owners who agree to help protect endangered species on their property will be assured that their obligations will not be changed if new species are designated in the future;
- multispecies recovery plans.

Again, I urge this Administration to continue along this course. We need to find new ways to make certain Federal programs work better—more flexibly, more fairly.

S. 605, however, represents an inappropriate approach to protecting the rights of property owners, and I urge my colleagues to vote against this bill.

PREPARED STATEMENT OF SENATOR CONRAD BURNS

Mr. Chairman, I am pleased that your Committee is having this hearing today. The 104th Congress needs to take a serious look at private property rights. The Judiciary Committee plays an important role in this debate because environmental laws and regulations often are embroiled in this issue.

For too long, Washington has disregarded the Fifth Amendment to our Constitution. Laws, regulations and other actions have allowed the rights of private property owners to be abused. Now we have the opportunity to provide a consistent federal policy to encourage, support, and promote the private ownership of property and to ensure the constitutional and legal rights of private property owners.

I believe Congress should enact legislation which reaffirms our private property rights. Compensation for a loss of property value when the federal government takes actions affecting property is essential. In addition, I believe that a takings impact analysis should be conducted prior to promulgating regulations. If these actions result in a loss of value of the property, some compensation should be required.

Montanans believe that protecting private property is of utmost importance. And Congress should reinforce the government's responsibility to protect property rights. We need to help get the federal government off the backs of Montana's working men and women.

Mr. Chairman, I am pleased your Committee is holding this hearing and I look forward to working with you on this matter in the future.



October 18, 1995

Honorable members of the Senate Judiciary Committee:

I am surely but one more in a long chain of property rights activists who will beseech your committee with plaintive or should I say plaintiff cries for assistance as you wend your way towards the passage of S-605 the property rights protection bill currently under your tutelage. I am, perhaps, unique in that I will likely be the sole Rhode Islander who would make comments on behalf of property owners supporting the concepts of S-605 and offering some brief constructive criticism long with my less efficacious prose on in response to arguments for or against the concepts embodied in S-605.

People in Washington often joke that I am the only property rights activist in Rhode Island, since I most consistently participate in the debate at a national level. Our state is relatively small and admittedly prone to the elevation of other problems over property rights, which has made it quite easy for me to claim the mantle of the state's property rights advocate with little competition. In so doing, I have faced being labeled by other participants in this debate. Most often I am called an anti-environmentalist, some suggest I am a front for developers, a recent internet mailing list publication asserted that I am a front group for Chuck Cushnian who runs the American Land Rights network out of Battle Ground, Washington.

While I can comment at length about what I am, and what I am not, I would ask in large part that you direct your attention on that matter to the attached article entitle "Activist with an attitude". Published on September 10 of this year by our major newspaper, The Providence Journal, it encapsulates much of my philosophy, activism and the underlying motivations and incidents which lead me to be a state and national advocate on these issues.

Suffice it to say, that regardless of what you believe I am now, 6 years ago I was just a back to nature yuppie minding his own business and largely ignorant of this debate. My last significant role as an activist was in fighting the Vietnam War and my political tradition was decidedly liberal. Conspiracy theorists who wish to believe that I have become a mind numbed robot answering to industrial masters must still ask themselves: "How did such an independent cuss become a corporate toady in such a short time, and make such a complete about face in his outwardly apparent politics. Actually, it only took one

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trip down to the bureaucracy store to change my perceptions of government and its role forever, and in such a compelling way that I can no longer be satisfied by a day I have lived unless I have driven another nail into the coffin of our country's bureaucracies.

I have purposefully taken the name which environmentalists believe best describes only those interested in so called "western" issues, because I wish to demonstrate that "WiseUse" is not a western concept, but one which should apply nationwide. The question of whether we should engage in a policy of sustainable use or abject protectionism is at issue whether the specific manifestation is found in a debate over logging in the Pacific Northwest or David Lucas' plans to build two houses on a beach in South Carolina.

Despite comments to the contrary made by my opponents in the environmental community, I do not perceive environmentalism or environmentalists as a conspiracy. "WiseUse", above all else, represents change from the current status quo and it will be attacked, not by a conspiracy, but by the natural tendency of society to resist change. Elements in society do not need to band together to resist change. It is not conspiratorial coincidence, but uncreative copycatism that spreads a similar vernacular amongst the opponents of "WiseUse". Of course they may capitalize on weaknesses inflicted by one another, just as vultures wait to feed on others' kills. But vultures are not conspirators, they are opportunists.

On the other hand environmentalists are quick to draw alleging that "WiseUse" is a conspiracy. Allegations that I am in some satanic alliance with Chuck Cushman for instance sound a bit paranoid to me. My knowledge and acquaintance with such national figures has actually been fostered by the environmental communities continued complete rejection of my own point of view and their spurious allegations that it isn't my point of view, but that I serve as a mouthpiece for others. I realized early on that I would be lumped in the same group with anyone environmentalist did not like, so I determined to meet as many of them as possible and understand their point of view. I have respect for the advocacy of Chuck Cushman. I have discussed the issues of "WiseUse" with Ron Arnold perhaps its most recognized mentor. Ironically, I have found these gentlemen because it was asserted that I must be in league with them due to the nature of my rhetoric. I certainly have a working relationship with some of the nationally renowned grassroots leaders in the fight for property rights, but I don't come to you as their spokesman, but as a simple Rhode Islander who has walked over the coals of regulation, environmental doomsaying, and sacred cow legislation to bring you my own assessment of the situation.

I append to this testimony, as well as the article on my own situation and activism, pieces on 2 other Rhode Islanders who are poster children of our struggle here in Rhode Island. The article detailing our movement in Rhode Island questions whether I have a developed constituency, in other words, for whom might you presume that I speak. I have served in some capacity as a voluntary ombudsman and support network for individuals in the state for 4 years now. While I have participated in bringing public scrutiny of the 2 debacles described in the accompanying articles, I have participated as an volunteer adviser in numerous other regulatory matters. My self appointed duties range from offering a shoulder to cry on to recommending legal counsel and in some cases assisting in the formulation of legal, political and PR strategy for those involved in such battles.

It is not entirely unfair to depict me, as reporter Peter Lord did, as a constituency of one in that the vast majority of people I deal with have no desire to come out of the closet - as it were. I am unusual

because I wear proudly the badge of "violinist" and "anti-environmentalist" I have reviewed my conduct and believe it to be beyond reproach. The need that some people have to call me names for attacking environmentalism's sacred cows is more comical than credible. On the other hand, most people are reticent to even discuss their problems with environmental bureaucrats in a public setting, nevermind take signs and march on the state house, or perhaps even more socially challenging to take signs and march on the Newport Mansions when they host environmentalist fetes. Therefore, you will not always see me surrounded by throngs when I make these evident and public outcries, but after the "Activist with an Attitude" article appeared in the paper I received numerous calls from people I did not know burgeoning my contact list in Rhode Island to several hundred individuals. Perhaps the most heartening of these was one caller who said to me "You may be a constituency of one, but you are not alone".

While I will doubtless be the only Rhode Islander testifying in favor of S-605, I will not be the lone Rhode Islander from whom you hear. Another of my statesmen is scheduled to testify before you today. For the benefit of the committee I wish to provide assistance in translating "Yankee" into "English". This is better accomplished through anecdote than dictionary. My mother often retold this story of my grandfather, a Rhode Islander who also spent the better part of his life running a summer camp in Sweden, Maine. He had ordered a timber of such heft to replace a rotted post in his home there, that it required a couple of men just to lift it. Yet when my grandfather arrived at the sawmill to pick it up, the purveyor looked casually up from his roaring saw and gestured to a helper, saying, "Mr. Jeffers is here for his stick".

It is perhaps unnecessary to regal the members of this August (actually October at this point) body with anecdotes of Yankee understatement which are both legion and legend, but seldom has a better practitioner of the art appeared before the committee than my own Senator John Chaffee who testifies today on the issue property rights. Few are more eloquent than he at understating the loss of property rights in this country which has occurred in the last score of years.

In fact, today, you and Senator Chaffee will trade repartee on a fagot of sticks, that is the metaphorical bundle of rights associated with property. With polite but firm understatement Senator Chaffee will assure you that it is alright if someone clubs a fellow over the head and grabs half his sticks, because the same thief took half his neighbor's sticks as well. He will, no doubt, suavely assure you that rather than being disheartened that the thief in this case is actually the government, you should celebrate the fact that such brave actions make you, as co-conspirators, the Robin Hoods of the environment. In fact, the impact of the Senator's testimony upon you boils down to whether his talent for understatement will add heightened credibility to his juxtaposed overstated arguments that S-605 will surely make the sky fall, or whether such a contention will seem, instead, all the more patently ridiculous.

Judging from Senator Chaffee's treatises as delivered prior to the hearings he held in the Environment and Public Works committee on this issue, he already believes the matter to be well settled in court precedent and essentially outside the interests of the legislative branch. The job he apparently envisions for Congress is to make more assaults on property rights and see if the courts uphold them or not. Attributing the same degree of understatement to our historic struggles over civil rights, the token of 'separate but equal' education in Boston could have been dealt with simply by passing out subway tokens. Following the logic of Senator Chaffee's comments to his own committee, the decision of *Brown vs. Department of Education* was all that was necessary to rectify any inequities in our schools.

Mr. Chaffee ruminates upon granting a great deal of respect to the history of this problem before the courts and in essence recommends at the outset that existing remedy at law appears sufficient. If one would place all their faith in the administration of law, one might as readily say that nuisance law is sufficient to prevent pollution since a tort remedy is available to anyone aggrieved by an environmentally degrading action of another. I agree that if we did away with bureaucracy altogether, there would be a significantly lessened nexus for a bill such as S-605.

Congress has, however, already failed to even begin that process in the form of the Regulatory Relief Act this session. Further, it is not the Providence of congress to administrate law, but to write it. It is not at all the job of Congress to simply codify the opinions of the Court, but to compare them, in a political context, to the realities of the day. Congress must lead, not follow.

It is not that I lack respect or a certain studious affinity for the legal framework which now exists relative to Property Rights, but significant precedents do not generally end the congressional debate, but begin it. Decisions such as *Brown* were the precedent for major civil rights legislation. They made the need obvious rather than obviated.

I have discussed recent precedent with John Chaffee's office during the last several years, and they claim on his behalf to be supportive of the high court's decisions in *Lucas* and *Dolan*. One cannot support these decisions without acknowledging that the import of them is far from being realized in the real world. Most scholars agree that *Lucas* was an open and shut case to begin with. It should disturb Congress and Mr. Chaffee greatly that David Lucas had to fight all the way to the Supreme Court for the relief he was owed. Despite the theoretical precedent inherent in *Lucas* and *Dolan*, the decision of the court effects no front line penalty to discourage government bureaucracies at local, state or federal level from undertaking just the kind of action which aggrieved David Lucas and Florence Dolan. These important precedents no more guarantee property rights than *Brown* guaranteed a fair social compact on education.

Environmental bureaucrats have simply honed that old saw, "So, sue me". On the environmental side we have created roadblocks to the future of our country through citizen suit provisions which allow people with no standing to enter disputes and force the government to pay their legal bills. Those on the property rights side of the equation who are often directly harmed find their own standing dependent on their ability to pay. This holds true despite the institution of so-called 'administrative appeals' in many state regulatory processes.

A fair property rights act must provide for ombudsmanship in this process and must absent administrative decision makers from the regulatory body. In Rhode Island, administrative hearing officers are employees of the agency whose decisions they rule on. This has created a quasi-judicial farce which one is ill-advised to enter without an attorney and proves, almost to a fault, to be simply a stepping stone to the courthouse or worse an impediment to swift relief in the courts (in as much as such is not an oxymoronic concept when taken in the context of jurisprudence).

As one may ascertain from reading the attached article on my activities in Senator Chaffee's home state, I am a lay activist on these issues, but I can walk with him right down the aisle of precedence on these issues. For, I do agree that a grounded understanding of the court interpretations is helpful in the construction of a congressional remedy for the evident transgressions of property rights which continue around the clock while this legislation is debated. (See also the attached article on my fellow Rhode

Islander. Bill Stamp, who faces destruction of a legacy of 5 generations farming in my state at the hands of cabal of state and federal wetlands regulators.)

Of utmost importance are the comments of Justice Stewart in *Lynch vs. Household Finance* (92 S.Ct.1113 @ 1122):

"... the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal right'". Congress, with or without Senator Chaffee, must lead the discussion of property rights in this direction. We are talking about basic civil rights here, no different from any of those which have been fought for in the history of this country.

I would not compare myself as a leader to Martin Luther King, but my motives are as pure and my ideology as unwavering. It is of great concern to me that Senator Chaffee has attacked my motives and ideology in our home state. He was quoted in the Providence Journal as depicting my activities as emblematic of developers leading their blind aunts in front of them at knife-point to beseech our own state legislature for relief. This would be somewhat akin to suggesting that Martin Luther King only advocated racial equality because he was black. I ask that if Senator Chaffee or the committee believe that this is my intent in entering this process they request my testimony in person so that I may defend myself against such allegations.

I did, in fact, and on numerous occasions request an opportunity to testify before Senator Chaffee's committee in the process the results of which he seeks to report to you today. Perhaps he or his staff felt the inclusion of lay voices on the issue of legal precedent to be inappropriate. I can't imagine another reason for excluding one's constituent who has an unparalleled record of advocacy on the issues being discussed in the Chairman's home state.

Actually, that very line of reasoning indicates why legal precedence is of little import to solving the immediate civil rights problems which many citizens are experiencing relative to Property Rights. Precedence and arcana are somewhat synonymous in this as in all cases. They are not beyond the understanding of the laity, but simply beyond their ken. In the real world, precedence will no more serve to protect an individual's property rights than they could protect a black man being beaten by a gang of whites intolerant of whatever expression of equality they perceived to be inherent in the victim's existence. Knowing that one's civil rights, as well as one's person, are being violated in such an incident does little to soften the blows, nor does it give an individual empowered by that knowledge much protection against such an attack in the first place. For all the laws and precedence on racial equality, we have spent 150 years trying to achieve it, only to find it is still held hostage by attitudes which are in many ways unaffected by the courts. Bureaucrats are no different from gangs in that they are likewise insular to the civil import of their actions.

But the depth of my own acumen and contemplation of precedence in this issue goes far beyond the obvious admonitions of Justice Stewart. Senator Chaffee in addressing his own committee has attempted to open wide the umbrella of "Reciprocity of Advantage" and husband under it all his sacred environmental legislation.

"...does it really make sense to pay a property owner to comply with a law that imposes a restriction on the uses of his land when the value of his property also is enhanced by the very same restriction being imposed on his neighbors?" text of remarks by Senator Chaffee delivered prior to hearing witnesses in Committee on Environment and Public Works, June 27, 1995

If one examines the history of this theory, one must admit that it is suspect from the start, having its origins in class warfare that continues to permeate all debates over civil rights, including those over property rights.

The 1926 decision which is recognized as most heartily endorsing and advancing the theory, *Euclid v. Amber* (47 S.Ct. 114), basically endorses segregation in disguise. It is the foundation of the current overexpansiveness of local zoning adventures. For those unacquainted with the facts of the case, in brief, it examined the rights of the Town of Euclid Ohio to restrict the construction of apartment homes (those housing more than 2 families in this case) on significant portions of a tract owned by Amber Realty. At that time of unparalleled expansion in the country with waves of immigrants flocking to the symbol of the Statue of Liberty, the term 'apartment dwellers' was virtually synonymous with the lower classes of such masses of humanity. Some scholars suggest that the decision itself was based not as much in law as in the personal distaste of the justices for the mixing of the classes.

If one follows the paper trail of this case, it actually leads to the positing of just such an argument by the appeals judge in the ruling which gave rise to the Supreme Court Case (297 F. 307). In holding the 'zoning' restriction imposed by the town of Euclid to be constitutionally invalid, Justice Westerhaven states in part:

"Compare, also... .. *Buchanan v. Warley*, 245 U.S. 60, 38 Sup.Ct. 16, 62 L.Ed. 149, L.R.A. 1918C, 210, Ann. Cas. 1918A, 1201, in which an ordinance of the city of Louisville, held by the state Supreme Court to be valid and within the legislative power delegated to the city, districting and restricting residential blocks so that the white and colored races should be segregated, was held to be a violation of the Fourteenth Amendment and void. It seems to me that no candid mind can deny that more and stronger reasons exist, having a real and substantial relation to the public peace, supporting such an ordinance than can be urged under any aspect of the police power to support the present ordinance as applied to plaintiff's property. And no gift of second sight is required to foresee that if this Kentucky statute had been sustained, its provisions would have spread from city to city throughout the length and breadth of the land. And it is equally apparent that the next step in the exercise of this police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance."

The vernacular of 'Judicial Cognizance' at that point was evidently less culturally sensitive in that day, but was quite clearly honest on this point. As a person who supports the move to devolution, I recognize local zoning, which was at issue in this case, to be administered at essentially the smallest practical unit of government that exists, however, I no more support unconstitutional gerrymandering accomplished by local zoning that I do the anti-development ethic currently masquerading just beneath the surface of even our most revered federal and state environmental laws.

I do however recognize that there is a significant difference in legal interpretation of the extent of the police powers between locally and somewhat evenly intrusive regulation and the types of state and federal policies that John Chaffee would seek to pull under the 'reciprocity of advantage' umbrella. Senator Chaffee, in fact, does a disservice to those of local ordinances that do work constitutionally and serve the needs of their community when he attempts to append his concern for federal regulatory power to their coultails (or robe tails if we are discussing precedents. Regulation of the sort Senator Chaffee would append to the "reciprocity of advantage" defense against the 5th amendment is far more selective in its import than zoning regulation. For instance, if you own a wetland and several of your neighbors do not, they may theoretically be subject to the wetlands statutes, but the only one who has given anything is the

person who owns wetlands. People who do not own wetlands have no token to offer in return for their advantage gained from the restriction placed on the wetland owner. This is why such regulation falls under a more limited interpretation of the police powers.

If, in fact, we perceived a world of pure 'reciprocity of advantage' as John Chaffee advocates, we could solve all our budget woes because we would have no expenses. All the needs of government could be exacted willy-nilly from whichever citizens happened to have them based on the concept that they might as readily have been taken from some other citizen who had the misfortune to own that which the public coveted. More specifically, imagine such a concept applied to public roadbuilding during the construction of our interstate highway system. Concepts as put forward by our environmental regulatory bureaucracies of today, if employed by the transit bureaucracies during that period would have readily resulted in the seizure of the vast majority of the interstate system without the payment of compensation.

The interstate's by design, while connecting urban centers, ran largely through less developed areas. For the most part, they did not require the condemnation of the entire holdings of most individuals, but only a portion thereof. The construction of the system was viewed as critical to interstate commerce (the ostensible public good protected for instance by the Army Corps Section 404 authority which Mr. Chaffee heralds as a vanguard of our environmental protection). It certainly had public safety implications relative to relieving congestion and traffic hazard through provision of limited access roadways for those traveling longer distances at higher speeds. Movement of goods and services needed for public safety and convenience were greatly enhanced as well.

It could readily be argued that those whose land was required to provide for such well intended improvement of the public condition would benefit equally with other citizens, perhaps even a little more so due to proximity, although this so-called 'givings' argument is specious in today's world when taken in context of the overlaying layers of regulation controlling capitalizing on such opportunity. It also presumes that the farmer whose land is bisected by a highway would prefer to open a McDonald's rather than remain a resource worker (see again, the attached editorial retelling of the story of Bill Stamp, a Rhode Island Farmer who received just such a 'giving' when the town of Cranston declared his land to be a valuable industrial site.) Such 'givings' are never without their negative consequences which are in addition to potential specific loss of property. In fact, very few people clamor to have a highway through their neighborhood. Above all, this argument fails, because regardless of benefit whether positive or negative to those whose land must be taken for a road, there is no corresponding exaction made of others who benefit in relative equality from the construction of the highway. The great equalizer is the recognition of the need to compensate.

Under current bureaucratic thinking, compensation would be unnecessary if a property owner's entire property were not taken for a highway. Application of the *Lucas* precedent in strict reliance on the largely held misperception that 'all beneficial use' must be lost in order to trigger the 5th amendment could have let the 'transitocracy' of the day avoid compensation if they simply left a property owner enough space to build a house on, or a few acres to grow potatoes.

Some argue that this scenario is a mixed metaphor. In the case of highway construction, the stick taken from the proverbial bundle is "ownership", in the case of regulation, it is "use". The court they argue does not view all the sticks in the bundle equally. I suggest that such opponents of property rights cannot see the forest for the sticks. Each stick in the bundle is critically important or the peasant need not

carry such a burden. Further, the precedent of *Lucas* is to uphold the concept that preventing practical and reasonably expected use can and will be considering a taking under the 5th amendment.

At this point, the environmentalists have retreated to their Maginot line which is the concept that 'all beneficial use' must be denied in order to trigger compensation. This is morally and rationally incorrect, as well as inconsistent with precedence. If we follow the rational argument that denial of beneficial use is essentially equivalent to condemnation (effects inverse condemnation), then we must ask: Why is it that if a portion of a person's property is condemned for a public purpose, such action is compensated, but if that person is denied use (inverse condemnation) of a portion of their property, such an action is uncompensated. Such a paradigm should not be uncompensated, but indefensible.

This is one area in which I agree with Senator Chaffee. The one aspect in which both House and Senate efforts to right the listing ship of property rights have failed the public discussion is the inclusion of a percentage cap. I said as much in House Task Force on Property Rights and I say so again here. I understand the concept that such a cap serves as a 'de minimus' but its inclusion clouds the argument and allows Senator Chaffee to expound the entirely false argument that the bill proposes to create rights in excess of those available under the constitution.

I am quite well aware that your efforts are only to make available those rights which are inherently ours under the constitution. For reasons of pragmatism in government, your inclusion of the cap has allowed arguments to be turned against us which have no business being made. Senator Chaffee apparently asks you to remove the cap from the bill and I concur.

"After all, isn't it somewhat arbitrary to compensate one owner whose property has been devalued by just one percentage point below that same threshold?" *text of remarks by Senator Chaffee delivered prior to hearing witnesses in Committee on Environment and Public Works, July 12, 1995*

You need not go far to find precedence supporting such an action. *Dolan vs. City of Tigard* is perhaps the most well known decision recognizing a partial taking. The formula has nothing whatsoever to do with the percentage of impact either area wise or economically. In essence it considered the subject area of property which was proposed to be exacted for drainage and for a bike path almost as if it were a separate piece from the unaffected remainder of the plaintiff's property. Again, the argument is made that the stick of the bundle which allows you to exclude others is pretty important and that this is the basis upon which the proposed exactions for a bike path from Florence Dolan were overturned by the court.

Other anti-use regulations, environmentalists argue, go after different sticks in the bundle of rights and might not be subject to as strict an interpretation as posited in *Dolan*. Of course, the drainage easement had nothing to do with allowing people to traverse the property and was held equally invalid. Some suggest that the court left the door open for municipalities and agencies to justify such exactions, which is not untrue, it simply changes the burden of proof which had rested on the petitioner to a more balanced framework, but above all, recognizes quite clearly that the false doctrine that a partial taking is not a taking is non-existent.

This is echoed in cases decided against the regulators which the Supreme Court has chosen to decline to hear. Those include *Loveladies Harbor v. United States* (28 F.3d 1171) which held inappropriate the consideration of prior financial reward obtained by the plaintiffs in developing 200 acres of a 250 acre tract in relation to determining whether the Army Corps had committed a taking under the 5th amendment by preventing the development of the remnant 50 acres. Also of pertinence *Florida Rock*

Industries v. United States (18 F.3d. 1560) The specificity of this decision illuminates the per force existence of a partial takings doctrine. The findings of the appeals court are that "evidence did not support finding that all economic use or value of property was taken by regulatory decision" (from the West Law summary of the case) and the case was still remanded to determine whether a taking had occurred. While not, to my knowledge, finally adjudicated, the very point of the remand is that there is such a thing as a partial taking.

In fact, cases such as *Lucas* which refer essentially to a complete economic taking recognize such an action as a "prima facie" taking while demanding an ad hoc examination of other situations suggesting that and regulatory action which results in more than a "mere diminution in value" is ripe for examination as to partial takings implications. Of consideration in such assessments are the character of the regulatory action or exaction involved in comparison with the investment backed expectations of the property owner. The doctrine expound in *Dolan* (114 S.Ct. 2309) is perhaps the simplest distillation of this process when the decision states "the necessary connection required by the Fifth Amendment is 'rough proportionality.'" No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the proposed development's impact."

As a property rights advocate I applaud this bright line. It is perhaps even less strict than I feel the constitution truly requires, however it is a workable paradigm. In theory, Senator Chaffee supports this decision as well. The problem now is in practice. How may we receive the benefits of this decision down here in the real world. The administrative process you implement in the context of S-605 must be one in which lay persons can participate and in which they can argue the "rough proportionality" of agency actions. The percentage of impact is unimportant and should be removed from the bill. Instead the trigger should be any action which is not roughly proportional to the impact of a property owners action or inaction.

Will this cost money. In the immediate sense, yes. No discussion of precedent or the monetary implications of takings law would be complete without a final reference to Justice Holmes's writing in the most oft quoted decision on takings in *Pennsylvania Coal v. Mahon* (43 S. Ct. 158). Holmes wrote

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power," and this is the line constantly quoted by environmentalists. This is on the second page of the decision, and apparently most environmentalists have short attention spans, because they failed to read the rest of the decision. Otherwise I am sure they would never publish such a remark without reporting these qualifications enumerated by Justice Holmes on the third pages: "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation... When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

[9] The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

If we have to 'pay for the change', as Justice Holmes suggests, will we be hoist on the petard of the budget? Such arguments, along with Senator Chaffee being the foil for environmentalists interests in

this matter helps to make clear that this is not a partisan struggle. It would appear that on occasion the Senator kind of forgets what party he is in anyway. As well as having S 605 assaulted from the sensitive wing of the party on the basis of its appearance, if not, as I have argued, its substance, you also face the daunting task of convincing the budget hawks that the moral imperative of such relief outweighs the monetary implications.

There are several factors that lead me to believe the monetary impact of S-605 would be relatively little. The inherent presumption, under which administrative takings are compensated for from the budgets of agencies which commit them, forces Congress to budget for environmental protection. This is in the alternative to paying huge judgments to those well off enough to use the court system to obtain redress. One cannot fault them or be cynical about their success, which often is Pyrrhic in nature anyway. The judgments themselves are no small matter. Over \$2 million in *Loveladies Harbor*. \$100 million in *Whitney Benefits*. The jury is still out in *Florida Rock*. This is to say nothing of the extra costs that agencies bear by having a combative and litigative relationship with their subjects.

I agree that Americans as a whole have not rejected environmental protection, and it is simply time we budgeted for it. Obviously, it would not be the will of Congress to give regulatory agencies simply as much as they could spend, regardless of concern for the environment. This will require the agencies to pick and choose amongst their conservation and sustenance strategies for the most efficient and most important investments. Both the psychological and pragmatic freeing of some property owners from the existing regulatory burden will create one thing, and that one thing is economic activity.

The agencies are still empowered to protect and regulate such activity in 'rough proportion' to its impact without so-stated "paying polluters". That concept as we all know verbally pollutes and obfuscates this discussion. Meanwhile, the enthusiasm of the millions of small property owners at relief from the draconian limitation of their American dreams will generate, much the same as a tax cut does, an inflow to the treasury. I haven't the Congressional Budget Office or some other staff of trained actuaries to declare to you today that the impact would be net positive, but it will be highly mitigative of costs incurred by the agencies for protecting those properties (either through purchase of fee or easement) that we truly deem it in the public interest to protect.

My belief in precedence leads me to an entirely different conclusion than Senator Chaffee and yet we rely upon the same body of evidence. Learned men may differ, which cannot substitute for proof that either of us are learned men, but since I have not the parity of impact or position that the Senator has earned through his service, I ask that if my words have resonance in this body that you lend them the strength of your positions and convictions as Senator Chaffee has lent his to the beliefs of others than myself.

Brian Bishop
RI WISEUSE

The Providence Sunday Journal

SEPTEMBER 10, 1995

Activist with an attitude

*Brian Bishop loves the environment,
but despises DEM and Save the Bay*

By PETER LORD

Journal-Bulletin Staff Writer

EXETER - A blue volleyball floats above the net until a young man jumps high and punches it into the sand on the other side. It is a great spike, and in any other volleyball game it would score a point. But not here.

It's Labor Day afternoon at Brian H. Bishop's Austin Farm and the air sparkles with laughter and music.

In an old sawmill, painstakingly restored with locally cut hardwood, a three-piece band waits out two-sets, rhythm and blues and waltzes. During breaks two men with mustaches play lifting Cajun music on a fiddle and accordion. Nearby at the millpond, a big man in a vest quietly fishes for stocked trout while children jump in and out of floating tire tubes.

Dozens of people who have found themselves on Bishop's mailing list - because of business, politics or acquaintanceships - walk between the great stone walls bisecting his 100-acre farm and plunk down at the mill - dubbed "Bishop's Castle" - for an afternoon of dancing. Catamount draft beer and Bishop's own brand of "one-bounce volleyball".

"This is so great it ought to be in the Olympics," Bishop yells as the game roils on under the hot sun.

The spike doesn't score because in Bishop's game the ball can bounce once on the ground between each hit. Sure enough, a youngster patiently watches the ball hit the ground and bounce high in the air. When it

comes down again, he swats it back over the net.

There are no out of bounds in this game. Players can cross under the net to retrieve balls. Big players have no special advantage. Everyone has a chance. And there's no referee to slow things down with anything so annoying as rules.

It's the perfect game for this outspoken man who has spent the last three years waging a noisy little war against Rhode Island's two great umpires for the environment. Save the Bay and the state Department of Environmental Management.

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Every spring when Save the Bay produces its annual meeting extravaganza at Newport's Goat Island, chances are you'll see most of Rhode Island's elected officials belled up to the buffet line. It's the place for everybody who is anybody.

But not for Bishop.

Like one of those lonely figures protesting a bad deal at a car dealership, Bishop has stood outside and picketed Save the Bay's last three meetings, lambasting the popular environmental group with posters that complain it is "anti-people".

Savoring even more distaste for the state DEM, he has set up his one-man picket line outside DEM offices and crashed a few meetings between DEM and various environmental activists.

This summer, he was the only Rhode Islander to testify before a congressional panel on property rights issues. Unlike Rhode Island's

congressional delegation, which is four-square against such legislation, he was very vocally in favor.

When he's not holding signs, he's at the computer in his tiny farmhouse, generating rambling newsletters, elaborate brochures and colorful replicas of the publications he loves to spoof like Save the Bay's monthly newsletter and the Providence Phoenix.

For three years Bishop has waged a loud but lonely campaign against Rhode Island's environmental establishment.

With his dark hair and bushy beard, he looks like he should be playing accordion in a Cajun band. He usually wears flannel shirts and worn jeans and his hands are thick and callused, like a farmer's. But in a voice that booms so loudly you have to hold the telephone from your ear when he calls, he can talk - literally for hours - about arcane environmental laws and movements and their effects on everyone from loggers in the Northwest to homeowners in Southeastern Massachusetts.

Just who is this guy?

Bishop runs a farm in Exeter. But he makes his living as a carpenter and landlord. He also promotes big parties and a small fishing club. He is an admitted violator of state wetlands regulations - and - when not otherwise busy - the local representative of a national movement called "Wise Use" - people who believe they should be able to use their properties without

Testimony of Brian Bishop

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Appendix A (Activist w/ Attitude)

intrusion from government regulators.

He describes himself as an environmentalist who hates environmental groups, an advocate for those victimized by advocacy groups.

And while he readily concedes that he has attracted very little following here despite years of work, his efforts offer a glimpse into the growing nationwide movement to curb the environmental regulatory establishment with all of its regulations and permits.

...

Greeting a visitor to his farm recently, Bishop, 37, is bent over a power saw in his workshop. Around the corner a blacksmith pounds new shoes on the horses Bishop's tenants keep in the barn, under a roof with more swells than South County surf.

As he walks through his fields, a small shaggy dog trots alongside. Past the field, as he approaches his old mill and its pond, he startles an osprey that was waiting to snag a trout. It soars off with great swooping wings.

By working and preserving this farm, Bishop argues, he is doing plenty for the environment. He doesn't need any bureaucrat from Providence to tell him how to go about it.

All his life, he admits, he's disdained rules and authority figures.

Bishop grew up and attended schools on Providence's East Side where his father, Edward F. Bishop, runs an insurance and real estate business. His mother graduated from Pembroke and his father and two sisters are Brown graduates. Many of his friends were the children of Brown professors.

He likes to point out that his parents let him skip a Boy Scout meeting so he could march in the Vietnam War protest demonstrations.

in the fall of 1969. "The only thing I learned from the Vietnam War was not that we were right or wrong - I learned that you should question authority."

He graduated from Classical High School with an admittedly spotty record and though he was admitted to the University of New Hampshire, he never set foot in a classroom.

Instead, he followed some friends to Michigan, where he spent several years doing carpentry and teaching mathematics in a private school.

He married a woman who raised horses and several years later they moved back to Rhode Island, where Bishop rented a rundown farm just west of Route 95 in Exeter.

Bishop grew two acres of vegetables, raised a herd of goats and began selling fresh produce on the East Side.

In 1986, Bishop and his family bought the farm. He is still annoyed that the Farmer's Home Administration, which grants low-interest mortgages in rural areas, wouldn't give him a loan that would have halved his monthly mortgage payment.

"They'd rather lend for single-family houses than for farms, which are more risky," Bishop said. "The result was we had to less farming and work harder at our outside jobs to pay for the place."

Bishop rents the main farm house, out by the road, to several tenants. Bishop lives in a tiny house near the barn that was rented to itinerant farmers at the turn of the century. The outside needs shingles and paint. Inside you see the chaos of a home being renovated while in use. Some walls have fresh sheetrock, others have none.

The kitchen table is covered with the letters, pamphlets and magazines that are the tools of an activist. In a back room a Macintosh computer

screen pokes above a torrent of computer disks, coffee cups and paperwork.

This is where Bishop produces his endless stream of letters to editors, party invitations and position papers.

It all grew out of confrontations he had several years ago, first with local authorities, then with the state.

In 1988 about 1400 acres of woods went on the market across the street Bishop, with backing from his father, bought the property for \$375,000 and launched an effort to market it to some friends in 20-acre lots.

"I was naive. I know that now. But then it was like a food co-op to me. We sell eight lots at about \$600,000 a piece and earn enough to pay our expenses."

No sooner had Bishop bought the land than the local planning board decided he needed to file a subdivision application. What was supposed to be a quick turnover of land dragged on for 2 years. Bishop said he would have dropped the project if he hadn't involved friends.

Carrying the costs of the new property forced him to fall behind on the mortgage and taxes for his own farm.

One of his lots was accessible only from the end of East Shore Drive, the road that runs along the east side of Boone Lake.

Bishop said he was aware that a few hundred square feet of undergrowth where he needed to build his driveway was probably wetlands - or at least wet during the spring. (Last week it was dry but a few ferns could be seen growing among the oaks and brush.)

But he reasoned that he was putting just on house on 26 acres - not the five allowed by town zoning. And he needed money badly.

So he rented a backhoe, scooped up some gravel, and in one day built a driveway through the wetland.

He had a buyer, but the man was worried about possible penalties and he persuaded Bishop to notify DEM.

"I felt strongly that I did the right thing by preserving more than a million square feet of open space. I said I'd go in and take my medicine from DEM," Bishop said. "So I hired an engineer and filed an after-the-fact application."

DEM charged Bishop with violating its wetlands regulations, fined him \$1675 and ordered him to remove the drive.

Bishop says he'll never forget the meeting where he tried to settle the dispute with DEM biologists.

"I agreed to take out the road. I offered to build a culvert, install pipes - to do whatever it would take to make them happy. But all I wanted in return was an unofficial assurance they would let me put the drive back in after the repairs were done."

"They couldn't tell me that. And that's when I decided I was not taking part in a rational process."

Bishop later signed a consent decree and paid a \$1000 fine. He sold the lot to someone who built a log home there. The new owner was immediately cited for running heavy trucks through the same wetland.

A few months later, in the spring of 1992, Bishop read a story in the *Journal-Bulletin* about legislation filed by North Kingstown lawyer John J. Kupa. It would require the state to compensate anyone it prevented from developing their land because of wetlands.

Kupa argued that if his bill passed the state could lay off most of its wetland regulators, and the state's economy would take a turn for the better. Officials at Save The Bay and DEM were apoplectic, arguing it

would either cost the state tens of millions of dollars or give developers a license to destroy wetlands at will.

Bishop says he knew right away which side to join.

• • •

Bishop showed up at the General Assembly hearing with buttons saying "DEM VICTIMS." He handed out brochures complaining that DEM was acting as prosecutor and judge in wetlands cases. And he found plenty of other people who felt the same way.

Even some of the legislators who were lawyers began offering anecdotes about delays and poor treatment in seeking wetland permits for clients from DEM bureaucrats.

Bishop was hooked. He began attending other hearings, meeting with others who had had trouble with DEM and working with national activists.

He says he poured so much energy into his activism, he let his marriage fall apart.

He now has a second wife, and keeps writing his party announcements and news release. Local newspapers publish some of his essays, and he mails others to government officials and newspaper editors.

Bishop, who has founded Rhode Island Wise Use and is the northeast representative for Alliance for America, an umbrella group for Wise Use groups, says in a recent "statement of purpose" that he's seeking solutions to environmental concerns that are sensitive to mankind as well as to plants and other animals.

In a sampling of recent essays he:

• Chastises the *Journal-Bulletin* ("a fan club magazine for DEM") for praising a decision by DEM director, "talk-lots, do-little re-engineer Tim Keeney, to appoint longtime DEM

staffer Roger Green as DEM's ombudsman - a job that should have gone to an outsider.

"Roger Green may be an honorable man, but it is far more than an apparent conflict of interest that he should be expected to play the devil's advocate we so vitally need to take on DEM's well-deserved reputation for an unresponsive superiority complex."

• Criticizes the U.S. Supreme Court for upholding the federal government's right to order property owners not to develop portions of their properties that are home to endangered species. As a result of such decisions, he argues, landowners are cutting their trees before they become mature enough to harbor endangered animals.

• Questions how federal officials could raise concerns about Rhode Island's air quality when it's not that bad. "They spend more time dwelling on scaring us to death about our air quality and less time on advertising where and when one can easily catch the bus."

He picketed at a Save the Bay party this summer hosted by Ted Turner and Jane Fonda, complaining they are elitists who made radical alterations to the land around their Montana ranch, while supporting environmental groups that fight against every move made by local developers.

And he held up signs when Vice President Al Gore attended Save the Bay's last annual meeting. One proclaimed: "Stop Gore's Genocide of Rural Culture."

—

Even those under attack by Bishop find some good things to say about him.

Josh Fenton, chief lobbyist for DEM, invited Bishop to speak at a statewide leadership training program earlier this year.

"He's very articulate. He gets a lot of facts and figures," said Fenton. "Although I don't think he always presents them in an honest way."

Fenton agrees there was an uprising of sorts in 1992 against DEM and the way it administered its wetlands and septic system rules. But since then, he says, the regulators have met with their critics and solved many of the problems. Relationships have improved, not worsened.

"What's interesting is that even though (Bishop) has put together a message and gotten it on the airwaves, he has not picked up any momentum at all. He's been out there for four years, spent some money, varied the issues, and there really has not been a public following."

"I think that's because there is a firm commitment to the environment in Rhode Island."

This year Bishop worked with state Rep. Lou Raptakis on efforts to postpone state plans to set up regional auto emissions testing centers, and Raptakis lauds his work.

"He's very articulate. He comes out with some very fascinating data," Raptakis said. "He helped me quite a bit putting my legislation together."

But Save the Bay spokesman Fred Maswie isn't so impressed.

"He's tilting at windmills. His language and presentations talk a bout a conspiracy of evil that no one else sees."

"He has a constituency of one. And in a way it's kind of sad because he represents this 'back to the land' movement, but on the other side there's this developer. On one hand he is counterculture, but on the other hand he uses arguments of the timber industry."

"It always puzzles me when individuals jump on the bandwagon

with big companies. He's a constituency of one."

"Also unnerving is where does his money come from? Is it his money? I'd like to know."

Bishop responds that he is using his own money for his lobbying - as much as \$300 monthly for telephone bills and \$2000 for a single brochure. He counters that Save the Bay raises money by constantly fomenting crises.

He says he responded to accusations about siding with big business when he testified before Congress this summer.

While most witnesses raised horror stories about their disputes with government bureaucrats, Bishop says he focused on the history of Americans revolting against their government.

"To hear this is a corporate war on the environment really irks me," he says. "These are individuals - real people."

"The biggest piece of my life has always been the farm," he said. "But now I write for a land rights newsletter. I've demonstrated against Al Gore and Ted Turner. But until I feel I've rounded the corner, I won't be able to concentrate on the farm. Because I'll always feel at risk that someone will come and tell us what we can do here."

"People don't understand me. I am unusual. I know in some sense by being the person I am I create a certain level of criticism by being out of the sphere. But that is not going to nuke me go back into the sphere."

"I am not going to get a huge following or change the state. But I am going to keep being who I am."

• • •

Last year some neighbors complained about parties at Bishop's farm.

The Exeter Zoning Board finally ordered him to stop holding the parties because they amounted to a communal use of residential land.

Bishop insists the farm has been used communally for decades for everything from hunting groups to fish clubs. So he continues inviting guests by the hundreds.

After the Labor Day volleyball game, Bishop, clad in cut-off shorts and sneakers, runs to the edge of his mill pond, bounces into the air and performs a somersault before splashing into the pond.

He comes out dripping and laughing.

"Every time I play I love," he says. "But what the hell. Everybody has a good time."

Then he pours himself another beer from the kegs his sister brought from Vermont. He steps into the mill that he rebuilt with his friends. He passes the yogurt cup around for donations to the band that got together just for this party.

He picks out a friend, and they two-step around the room as the band plays on.

Once a month, Air, Land & Water explores how government policies and the actions of individuals and businesses affect the air we breathe, the water we drink and the landscape that surrounds us.

If you have comments or suggestions, please contact environmental reporter Peter Lord in the Warwick office at 737-5070 or by writing him, care of the Providence Journal-Bulletin, 535 Centerville Rd., Warwick, R.I. 02886.

The Providence Journal

OCTOBER 13, 1995

The Constitution versus the Corps

• Bill Stamp is a fighter and his evidence is strong. There still is a possibility that he may win this ordeal. If so, his fable would make even Aesop proud. If he fails, so does the Constitution.

MACE THORNTON

CHICAGO—If all the stories of Americans facing ruin because of government regulations are merely "anecdotal" - as some assert - Rhode Island farmer Bill Stamp is on the verge of becoming the Aesop of all fabled regulatory victims. Stamp's nightmare is far from fable. Because of improper and inconsistent enforcement of wetlands regulations on his dry land, his American dream is slated to crumble around him next Jan. 1.

That is the day on which First Pioneer Farm Credit, of Middleboro, Mass., says it will end a period of forbearance, opening the door for foreclosure on a loan that would have been paid years ago had government wetlands regulators played by their own rules. Stamp could lose his home, his greenhouse operation and land that has been farmed by his family for three generations.

Bill Stamp has farmed all his life. Because of a rezoning of his farm land in Western Cranston as "industrial" and a higher tax revaluation, farming his land became

economically impossible. That's when he decided to develop his farm land, sell it and buy new farm land in Exeter and Richmond, an area unencumbered by urban growth.

After securing a state Department of Environmental Management permit in September, 1986, he started the project. Although the permit indicated that no further wetlands authorization would be required, the Army Corps of Engineers later told Stamp he would need a Section 404 wetlands permit.

Although his land was dry and had been farmed for years, Stamp submitted an application, respond to voluminous Army Corps requests and waited. After waiting more than 1 and 1/2 years, Stamp, working under authority of the state permit, began developing portions of the project that experts advised him clearly would not require Corps authorization.

Although traditionally agreeing with state permits, the Corps objected to Stamp's work and issued a Cease and Desist Order on Jan. 25, 1988. A paper trail meandered for two more years. Then, in February 1990, Stamp was sued by his own government, he was charged with filling a wetland.

After the suit's filing, the Corps entered negotiations with Stamp and presented a consent decree w. which Stamp signed, believe it to be his only alternative to financial ruin.

As part of the consent decree, the Corps ordered Stamp to apply for an after-the-fact permit for parts of his

work. After he did, the Corps denied the permit, on Aug. 27, 1991. That denial required Stamp to undo, at further expense, most of the work he had completed. As outlined in the consent decree, Stamp was required to restore an alleged 1.5-acre wetlands area, which the Corps said his work had affected.

In drawing up restoration plans, consulting wetlands experts from around the country determined that there was never a wetland present within the alleged violation area identified by the Corps. Stamp asked the Corps to reconsider the restoration order. The Corps denied Stamp's request.

On May 29, 1992 Stamp filed a motion with a federal court asking for a resolution. After the Corps objected, the matter was referred to a U.S. magistrate judge. On Aug. 12, 1992 the judge essentially recommended that Stamp's motion be denied. Stamp appealed the ruling, and, again, the Corps, unwilling to admit it was wrong, fought him.

By letter, the court on Oct. 20, 1992 decided a hearing was necessary to resolve the issues raised. Several hearings were held and additional negotiations ensued. Agreement was eventually reached and the prescribed restoration work completed, although Stamp and noted wetlands experts were sure it was unnecessary.

After the restoration, Stamp built an even more convincing case. For more than a year, however, Corps officials refused to consider new, extensive data that proved, by suit

Testimony of Brian Bishop

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Appendix B (Constitution vs. Corps)

type, that the land in question never should have been delineated as wetlands.

Finally, on Oct. 13, 1994, Stamp was notified by the Corps that a small part of his project could continue - a crucial ruling that would allow Stamp to partially develop the site, sell some lots and begin to repay the mountain of debt that had built up as a result of his regulatory appeals. The Corps also finally agreed that much of the area that it had earlier considered wetlands was, in fact, not.

Despite constant requests from Stamp before his restoration work, the Corps only agreed to consider the new information after the restoration was completed. Although the Corps instantly became enlightened once Stamp had completed restoration, officials stubbornly held to their original position that the 1.5-acre violation area was a wetland.

Wetlands experts say that the alleged violation area is identical to adjacent areas the Corps now agrees are not wetlands. The Corps still denies it made a mistake.

Meantime, with the Corps's approval of plans to partially develop the site, Stamp wanted to take all possible steps to avoid any setbacks that might prevent him from paying his financial obligations. He immediately informed state officials of the Corps's decision to let him proceed.

Much to his dismay, he was informed the original permit he obtained from the state in 1986 would not be honored. After nearly a decade of appeals, negotiations, stress and heartache, Stamp now finds himself back at square one.

With only 2 and 1/2 months remaining before foreclosure, Stamp is racing the clock to save his property. Prospects of his completing the task appear dismal.

Testimony of Brian Bishop

He will most likely become the latest "anecdotal" example of government regulations effectively stripping private property from its owner - a situation that certain members of Congress and their environmental backers continue to deny.

If Stamp loses his land, a lawsuit based on the Takings Clause of the Fifth Amendment would be in order. That clause states that private property shall not be taken by the government without just compensation being paid. If Bill Stamp's case is not a taking, the Constitution's ideals are not worth the parchment they are written on.

As Stamp has already discovered, however, lawsuits are expensive and stressful - an not exactly a feasible route for someone who is about to see his lifetime of work vanish because of foreclosure directly resulting from improper regulatory enforcement.

Those who argue against consideration of property rights in regulations assert that the judicial remedy is sufficient to right any wrongs. Clearly, they have never walked in Bill Stamp's shoes, nor have they walked across the dry land that their government asserts is wetlands. They have never had to negotiate with a government agency that is unwilling to admit an error.

Despite the looming deadline, Bill Stamp is still not ready to relinquish his property. Stamp is a fighter and his evidence is strong. There still is a slight possibility that he may win this regulatory ordeal. If he does, his fable would be one that would make even old Aesop proud. If he fails, so does the Constitution and its ideals, which embody everything American, including government for the people.

The Providence Journal

MAY 31, 1994

Wetlands rules haunt couple

• A Massachusetts couple have had to dig up the septic system and the foundation for the house they planned to build in Little Compton.

By PETER LORD

Journal-Bulletin Staff Writer

When Louise A. and W. Fredenck Williams III bought five acres to build a house amid the pastures and summer cottages of Little Compton six years ago, the concept of wetlands didn't mean much to them.

Now, the word "wetlands" conjures nightmares.

Because the state Department of Environmental Management ruled their property was wetlands, the Williamses last week had to rip up their house foundation and leaching field and plant trees so their land will revert to its natural state.

By their account, the Williamses have invested \$78,000 in their land and \$30,000 in building materials, paid \$20,000 to builder and spent more than \$60,000 on legal fees - and all they have to show for it is a muddy hole along West Main Road and a lot of bitterness towards state environmental officials. Believing they have been victimized by arrogant regulators, the Williamses have testified before a state Senate committee, written to every member of the General Assembly and had their story told in a national property-rights publication.

There is great dispute over the merits of the Williamses' case, but their story and others like it have helped prompt a low-key but concerted effort in the General Assembly to weaken Rhode Island's wetlands regulations.

A dozen bills are pending. Two of them would forbid DEM to pursue anonymous tips of illegal actions. One would require that it prepare a report estimating the cost of every environmental decision. Another would allow construction within 10 feet of pristine wetlands; the limit is now 200 feet.

Environmentalists have responded by forming a coalition of 27 groups, filing some bills of their own and insisting they will compromise no more.

Both sides agree that the future of development in Rhode Island is at stake. With much of the state's dry, flat land already developed, builders are increasingly seeking to use wetlands.

Late last week, representatives of both sides of the issue said legislative leaders were telling them that none of the bills would pass. Instead, a special commission will be appointed to review the state's wetlands law and recommend changes to the General Assembly.

Rep. Edward J. Smith, D-Tiverton, chairman of the Joint Committee on the Environment, confirmed Friday that he and other leaders favor a commission. (The general consensus was the General Assembly, not being an authority on

wetland issues, couldn't do anything on all this," he said.

Now, both sides are jockeying over the commission.

"We're not in favor of a commission at all," says Alison Walsh, issues coordinator at Save the Bay. "The other side is not being reasonable. They just don't want regulation. But we're not going to lie down anymore and compromise."

Ross Dagata, director of the Rhode Island Builders Association, said his members believe the state has gone too far with its wetlands policies and designated far too much land as wetlands.

Dagata said the builders plan to go ahead with a threatened lawsuit against a new set of wetlands regulations instituted two months ago. At the same time, Dagata said he's anxious to "sit down and work out a better law."

Wetlands are considered important for sponging up flood waters, recharging underground water supplies and providing wildlife habitat.

The question of just what constitutes a wetland is often subject to debate. While few disagree that streams and ponds are wetlands, biologists also denote as wetlands areas where the soil is soggy, or where certain plants grow that are common to areas that are periodically wet.

DEM rules substantially limit construction on or near wetlands. For instance, the law forbids building within 200 feet of a river or stream.

Testimony of Brian Bishop

1

Appendix C (Wetlands rules haunt couple)

but one bill would allow building within 10 feet.

Each year about 32 employees in DEM's Division of Wetlands process 6(K) to 7(K) applications to build near wetlands. Because their rulings can amount to a red light against building, their determinations can spell the difference between big money and a worthless piece of property.

The debate over protecting wetlands has reached the highest levels of state government.

In December, at a hearing on proposed new wetlands regulations, Lt. Gov. Robert A. Weygand and Joseph R. Paulino Jr., who at the time was director of the state Department of Economic Development, led critics opposed to further tightening of the state's wetlands regulations.

After some minor changes, DEM enacted the new rules.

But when Governor Sundlun fired DEM Director Louise Durfee last March, environmentalists were concerned that he was caving in to builders who thought she was enforcing wetlands laws too strictly. Sundlun quickly pledged that he wouldn't tamper with the new wetlands rules.

DEM changes training

The consequences of the debate over wetlands became startlingly real when you step on the lot where the Williamses just ripped out their foundation and septic system.

It appears to be very wet land. The ground is too soggy to cross without boots. Skunk cabbage and cattails grow right up to the edge of the foundation.

As Louise Williams supervised efforts to tear out the last vestiges of a house on her property, she couldn't hold back her anger.

She and her husband, both corporate executives, are used to

doing things right, she said. They talked to the local building official, hired two local engineers and dealt regularly with DEM on their new septic system.

"DEM keeps saying we should have known there were wetlands," she says. "But I'm not an engineer or an architect or a lawyer or a botanist. That's why we got professional people. This just isn't right. If you own 5 acres in the United States, you have the right to live on it."

Louise Williams insists that DEM's septic system inspectors visited her property several times and should have alerted her to the wetlands.

DEM officials now concede it would have been better if the inspectors sounded the alarm. But septic inspectors at the time focused just on septic systems, and were not trained to look at other problems. DEM now is providing broader training.

Catherine Robinson Hall, the lawyer representing DEM wetlands regulators, says Louise Williams neglected to mention that DEM, early on, advised her to consult DEM for a verification of the location of wetlands on the property. She never did, Hall said.

Dean Albro, chief of DEM's wetlands section, says that if the Williams case was at all marginal, DEM would have reached a compromise. But the land, he said, is saturated. Cattails grew out of the foundation after it was poured, he said.

The Williamses went through protracted hearings and administrative and legal appeals - that led ultimately to rejection by the Rhode Island Supreme Court.

The couple live in a condominium in Concord, Mass.

Instead of moving to Little Compton, they just visit.

And instead of enjoying the "birds, flowers, gentle breezes and the hope of a peaceful refuge" that they described in one letter, they are left with bitterness.

"What has happened to us is that DEM strung us out until the legal costs are greater than the value of the property," says Mrs. Williams. "How does a citizen protect himself from a government agency that doesn't tell the truth, has deep pockets funded by the public, can string you out forever? They are the king, they are the emperor."

PREPARED STATEMENT OF ROBERT J. CYNKAR AND F. EDWIN FROELICH

On December 8, 1994, President Clinton signed the Uruguay Round Agreements Act ("URAA") implementing the obligations of the United States under the General Agreement on Trade and Tariffs ("GATT").¹ The URAA conformed United States patent law to the international standards agreed to under GATT. As a result, all patents in effect on June 8, 1995 had their terms changed to the longer of 17 years from the date of grant or 20 years from date on which the application was filed.² This change extended the patent terms of scores of existing patents, including at least 13 pharmaceutical patents.³ A few members of Congress now have proposed to change federal law to take away these patent term extensions for pharmaceutical products.⁴ These legislative proposals, if enacted, would directly implicate the Takings Clause of the Fifth Amendment to the Constitution.⁵

The debate over whether to repeal these patent term extensions is the most recent manifestation of the inherent tensions between the interests of those pharmaceutical companies that bear the costs of researching and marketing pioneer drugs and those companies that are able to market cheaper, generic versions of those drugs because they have not borne those initial research and development costs. More specifically, the proposed legislation is an outgrowth of the policy debate and compromises that produced the Drug Price Competition and Patent Term Restoration Act of 1984 (the "Hatch-Waxman Act").⁶ Regardless of the public policy goals offered by proponents as justification for their proposals to repeal the patent term extensions, under long-established judicial precedent, the rights of existing patent holders are a form of property protected under the Constitution. Any taking of those rights by the federal government would entitle those property holders to compensation from the government under the Fifth Amendment.

Patent rights have a somewhat unique status under American law. Though a variety of intangible interests are protected as property under the Constitution,⁷ patent rights have perhaps the longest pedigree of unambiguous judicial recognition as property.⁸ This long history of recognizing and protecting the property rights embodied in a patent undoubtedly is due in some part to the fact that, unlike other intangible property rights, the Constitution explicitly authorizes Congress to secure patent rights.⁹ A far more important reason for this unwavering protection for patent rights in American jurisprudence, however, is the inherent legal nature of a patent right. As one court succinctly put it, "The patent right, solely that of excluding others, is the fundamental element of all human rights called 'property.'"¹⁰

For purposes of the proposed retroactive reduction of pharmaceutical patent terms, a patent has two essential attributes: exclusive rights for the patent holder, and a defined time period for those rights.¹¹ As Justice William O. Douglas ex-

¹ Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994).

² Pub. L. No. 103-465, § 532(a), 108 Stat. 4809, 4983-85 (amending 35 U.S.C. § 154(c)).

³ We recognize that the claim has been made that the URAA's patent term extensions do not fully apply in the context of pharmaceutical patents. However, given the unanimous ruling to the contrary in *DuPont Merck Pharmaceutical Co. v. Bristol-Myers Squibb Co.*, 62 F.3d 1397 (Fed. Cir. 1995), and the similar conclusion of the Food and Drug Administration, FDA Response to Petition of Glaxo, Inc., Docket No. 95P-0061/CPI (May 25, 1995), we have assumed for our analysis that this claim is not well-founded and that the URAA fully applies in the context of pharmaceutical patents.

⁴ See e.g., The Consumer Access to Prescription Drugs Act of 1995, S. 1191, 104th Cong., 1st Sess. (August 11, 1995).

⁵ The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation."

⁶ Pub. L. No. 98-417, 98 Stat. 1585 (1984).

⁷ See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 10034 (1984) (recognizing a trade secret as a property right protected by the Constitution).

⁸ See, e.g., *De La Verne Refrigerating Machine Co. v. Featherstone*, 147 U.S. 209, 222 (1893) ("The privileges granted by letters patent are plainly an instance of an incorporeal kind of personal property. * * *").

⁹ The Constitution expressly authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. 1, § 8, cl. 8.

¹⁰ *Nickola v. Peterson*, 580 F.2d 898, 914 n. 25 (6th Cir. 1978). See also *Carl Schenck, A.G. v. Norton Corp.*, 713 F.2d 782, 786 n. 3 (Fed. Cir. 1983) ("The patent right is but the right to exclude others, the very definition of 'property.'").

¹¹ 35 U.S.C. § 154(a)(1) as amended by Pub. L. 103-465. A patent consists of

the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States, or importing into the United States, products made by the process, referring to the specification for the particulars thereof.

plained, a patent "gives the patentee or his assignee the 'exclusive right to make, use, and vend the invention or discovery' for a limited period."¹² Thus, legislation affecting either the exclusive use of a product to which a patent holder is entitled, or the time period during which the patent holder is entitled to that exclusive use, affects core elements of the property right represented by a patent.¹³

To be sure, all patent rights are creatures of federal statute. But the fact that patent rights are in a sense a function of congressional discretion embodied in a statute does not mean that Congress has the freedom to change those rights once they are vested in particular patent holders. As the Supreme Court long ago pointed out, "when [the government] grants a patent the grantee is entitled to it as a matter of right, and does not receive it, as was originally supposed to be the case in England, as a matter of grace and favor."¹⁴ As a result, Congress does have broad discretion to legislate on the subject of patents so long as "they do not take away the rights of property in existing patents."¹⁵ Indeed, the Supreme Court has explicitly held that a repeal of a patent statute "can have no effect to impair the right of property then existing in a patentee, or his assignee. * * *"¹⁶

The proposed repeal of the URAA's patent term extensions with respect to pharmaceuticals that is, a reduction in the patent term to which existing patent holders are currently entitled would clearly deprive the patent holders of their property rights in those extensions.¹⁷ Accordingly, such legislation would trigger the Fifth Amendment guarantee that the property holders receive just compensation.¹⁸ As a result, the federal government would be required to put each patent holder in as good a financial position as they would have been if the patent term extensions had not been taken.¹⁹

In conclusion, given the unambiguous status of patent rights as property, the Supreme Court has long recognized that protections for private property provided in the Fifth Amendment fully apply to patents even though those patent rights are initially created through federal statute.²⁰ Should legislation be enacted that directly or indirectly takes the patent term extensions from the current patent holders, those patent holders would be entitled to fill compensation from the federal government for that property loss. Full compensation would be required as long as it

¹² *Transparent-Wrap Machine Corp. v Stokes & Smith Co.*, 329 U.S. 637, 643 (1947). See also *United States v. Dribilier Condenser Corp.*, 289 U.S. 178, 186-87 (1933) (explaining that a patent holder is given "exclusive enjoyment" of an invention for a period, "but upon expiration of that period, the knowledge of that invention inures to the people, who are thus enabled without restriction to practice it and profit by its use").

¹³ It is not uncommon for an intangible property interest to be limited to a certain period so that the time period is an aspect of the protected property right. For example, in *Choate v. Trapp*, 224 U.S. 665 (1912), land was allotted to the individual members of certain Indian tribes by land patents that provided that the land should be nontaxable for a limited time. When Congress tried to subject these lands to taxation before that period had expired, the Supreme Court held that Congress could not "lessen any of the rights of property which had been vested in the individual Indian by prior laws. Such rights are protected from repeal by the provisions of the Fifth Amendment." *Id.* at 678.

¹⁴ *James v. Campbell*, 104 U.S. 356, 358 (1882).

¹⁵ *McClurg v. Kingsland*, 42 U.S. 202, 206 (1843). See also 60 Am. Jur. 2d *Patents* § 7 (1987) ("[T]he repeal of patent laws cannot impair existing patent rights. ").

¹⁶ *McClurg v. Kingsland*, 42 U.S. at 206.

¹⁷ Any change to federal law that deprives the patent holders' of their rights in the patent extensions, regardless of how those rights are deprived, would trigger the protections of the Fifth Amendment. Therefore, the legal analysis is the same regardless of whether Congress were to take away the patent term extension rights by repealing the relevant provisions of the URAA, redefining terms in the URAA, amending the Hatch-Waxman Act, or making some other change in federal law.

¹⁸ The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

¹⁹ See, e.g., *United States v. Virginia Electric & Power Co.*, 365 U.S. 624, 633 (1961). It is important to note that the courts, not Congress, have the exclusive responsibility for determining what is just compensation in any particular case. Congress may not even set rules for the courts to use in determining compensation. See *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 327 (1893), *Baltimore & O. R. Co. v. United States*, 298 U.S. 349, 368 (1936), *Miller v. United States*, 620 F.2d 812, 837 (Ct. Cl. 1980).

²⁰ *James v. Campbell*, 104 U.S. at 358; *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 67 (1885) (observing that the "right of the patentee" is secured "by the constitutional guarantee which prohibits the taking of private property for public use without compensation"); *Transparent-Wrap Machine Corp. v Stokes & Smith Co.*, 329 U.S. at 643 (A patent right is accorded "the same dignity as any other property. ").

is government action that deprives the private party of its property right, regardless of whether the government itself acquires or uses the property.²¹

PREPARED STATEMENT OF MICHAEL L. DAVIS, CHIEF, REGULATORY BRANCH, U.S.
ARMY CORPS OF ENGINEERS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Thank you for the opportunity to provide the Administration's views regarding the effect of wetlands protection programs on the rights of private property owners and the effects that so-called "takings" bills would have on these same programs if enacted as law. I am Michael Davis, Chief of the Army Corps of Engineers Regulatory Branch, which has primary responsibility for the administration of the Clean Water Act Section 404 program. Section 404 is the primary Federal regulatory program for wetlands protection and will be the focus of my testimony today.

To say that the protection of wetlands through regulation has engendered considerable controversy in the past few years may be one of the few points of common ground between those that believe that the Section 404 program is no more than a Federal rubber stamp allowing the destruction of wetlands and those that suggest that the program tramples on the rights of private property owners. Opinions about the program too often ignore the facts, but instead are based on anecdote. This has led to legislative proposals such as H.R. 925 and S. 605 (takings bills) and H.R. 961 S. 851 (wetlands bills). We do not have to create a dichotomy between property rights and environmental protection. The Section 404 program has been successful in balancing the interests of all property owners—allowing reasonable development while protecting our Nation's aquatic resources.

When deciding whether changes to a particular program are needed or desirable, it is important to first understand how a program actually performs. In this case, how does the Section 404 program affect landowners? Before discussing the problems associated with S. 605 and similar takings bills such as H.R. 925, I will highlight recent Section 404 statistics and a few of the wetlands initiatives currently being implemented by the Administration. More detailed information will be provided in an upcoming Subcommittee hearing dealing specifically with wetlands.

SECTION 404 STATISTICS—HOW THE PROGRAM WORKS

Permits

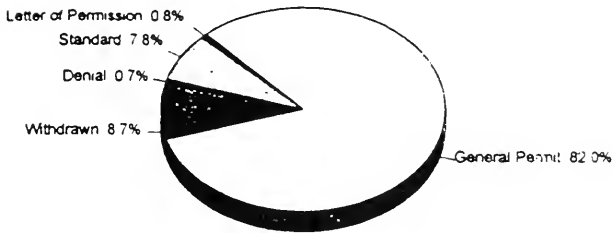
As noted in Figures 1 and 2, in Fiscal Year 1994 over 48,000 landowners asked the Corps for a Section 404 permit to discharge dredged or fill material into the waters of the United States, including wetlands. Over 80 percent received authorization under a general permit in an average time of 16 days. Less than 10 percent were subjected to the more detailed individual permit evaluation, where the average time was 127 days. Less than one percent of the 48,000 applications were denied. It may be that in a few cases the Corps took too long to evaluate an application and perhaps subjected landowners to an unnecessarily lengthy evaluation process. But these cases are very rare compared to the ones that go forward in a timely manner with minimal regulatory burdens.

As a case is made that generally the program is fair and working well from a landowner's perspective, some continue to criticize the Corps for issuing too many permits. What these individuals fail to recognize is that the Corps has been very successful in reducing wetlands impacts and adverse effects on other landowners, through the regulatory evaluation and conditioning process, including the general permit process. Most applicants are willing to avoid, minimize, and mitigate for project impacts. Through effective application of the environmental criteria and the public interest review, the Corps is successful in striking the correct balance between protection of the overall public interest and reasonable development of private property.

²¹ *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), quoted in *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1004-5.

CORPS OF ENGINEERS REGULATORY PROGRAM

FY 1994 - 404 APPLICATIONS - TYPE OF DECISION



TOTAL NUMBER EVALUATED: GENERAL PERMIT 39619 STANDARD PERMIT 3760 LETTER OF PERMISSION 374 WITHDRAWN 4184 DENIAL 358

Figure 1.

CORPS OF ENGINEERS REGULATORY PROGRAM

FY 1994 - 404 APPLICATIONS - AVERAGE EVALUATION DAYS

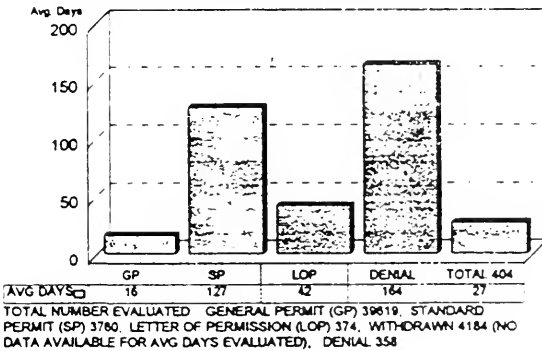


Figure 2.

Enforcement

Much has been said about a few highly publicized Section 404 wetland enforcement cases. The reality is that only approximately one percent of all Section 404 enforcement actions result in any kind of civil or criminal judicial action by the Federal Government. As indicated in Figure 3, the vast majority of violations are resolved by after-the-fact permits and voluntary actions by the landowner. Only in extreme cases does the Government find it necessary to pursue litigation.

**CORPS OF ENGINEERS REGULATORY PROGRAM
FY 1994 - ENFORCEMENT CASES**

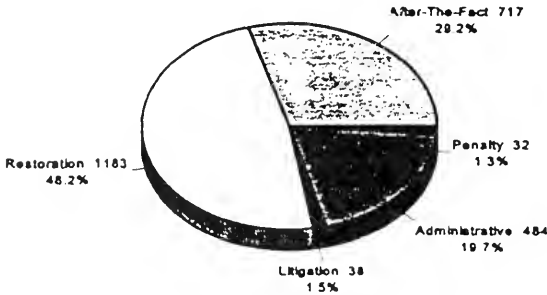


Figure 3.

ADMINISTRATION WETLANDS INITIATIVES—A FAIR, FLEXIBLE, AND EFFECTIVE APPROACH

Notwithstanding the statistics noted above, the Section 404 program is not perfect—from either the environmental protection standpoint or the regulatory burden perspective. There are a few real problems, and improvements can and should be made. The Clinton Administration is using its August 1993 Wetlands Plan as a policy roadmap for making all wetlands programs more fair, flexible, and effective. This 40-point plan emphasizes improving wetlands policy by:

- streamlining the wetlands permitting program to eliminate unnecessary regulator burdens;
- increasing cooperation with private landowners to protect and restore wetlands;
- basing wetland protection on good science and sound judgement; and
- increasing participation by States, Tribes, local governments, and the public in wetlands protection.

One criticism of the Section 404 program is that it treats landowners unfairly, particularly the “mom and pop” landowner. It should, however, be clear that the Corps and this Administration strongly support private property rights. The right to own, reasonably use and enjoy private property is vital to our nation’s economic strength and to our Constitutional heritage.

A central tenet of the Administration’s wetlands plan is to ensure that the Section 404 program is administered in a manner that is fair to all landowners and to the general public and the public interest. We have taken action to reduce delays and streamline the process for small landowners. As proposed on March 6, 1995, the Corps will soon issue a new general permit that will allow landowners to build or expand single-family homes in non-tidal wetlands without an individual permit when the total impacts are less than one-half acre. On March 6, 1995, the Corps and the Environmental Protection Agency (EPA) issued guidance to their field offices stating that for the construction of homes, farm buildings, and the expansion of small businesses impacting less than two acres of non-tidal wetlands, alternative sites not owned by the applicant are presumed to be impracticable. The Corps will soon propose for public comment a new program that will allow landowners to appeal a wetlands jurisdictional determination or a permit denial without going to court. In January 1994, the Corps, EPA, and the Fish and Wildlife Service (FWS) signed a memorandum of agreement with the Department of Agriculture’s Natural Resources Conservation Service (NRCS) that gives NRCS the lead for wetlands determinations on agricultural lands—for both the Food Security Act and CWA Section 404. Farmers no longer run the risk of getting two different answers from two Federal agencies. Later this year the Corps expects to finalize a program that will allow the government to rely more on private sector wetland consultants. This should free Corps personnel to conduct wetlands determinations more quickly for small landowners, and should reduce the overall time to evaluate applications for larger projects. The Corps, EPA, FWS, NRCS, and the National Marine Fisheries Service are in the process of finalizing guidance on wetlands mitigation banking.

When properly implemented, mitigation banking can provide another compensatory mitigation tool that is good for the aquatic environment and that provides landowners additional flexibility in meeting permit requirements. These are a few examples of how this Administration is working to reduce burdens on landowners and to make the program more fair.

There are some who believe that all wetlands are the same, and others who believe that we regulate all wetlands with the same rigor. While neither of these notions are true, those misunderstandings have led some to believe that we permit the destruction of too many wetlands, and led others to call for national classification, or ranking, of wetlands.

This administration has been unequivocal in stating that all wetlands are not the same, and should not be regulated in the same way. The regulatory response to a proposed project in wetlands should be commensurate with the relative functions and values of the resource and with the nature of the impacts associated with the particular project. For example, if a project involves a low-value wetland resource and has minor impacts, we should not require a rigorous evaluation of a permit application. In the alternative, if moderate to high value wetland resources are involved and the project impacts are substantial, we should require a detailed evaluation. We have emphasized this approach through regulatory guidance, and this is the way the program currently works. Using general permits, which authorize over 80 percent of all Section 404-regulated activities, and individual permits which take into account the specifics of the resource and the development project, we have the flexibility to make sound, common sense decisions based on the project impacts and the risk to the resource.

In the past year or so much has been written about the proper role and size of the Federal government. This has been discussed explicitly in the context of wetlands regulation. In the President's Wetlands Plan it is clear that this Administration recognizes fully the importance of developing strong partnerships with state, tribal, and local governments which have wetlands programs. In short, we will not meet our wetlands protection objectives if we rely solely on the Federal government. While we must maintain strong Federal programs, including the Section 404 program, we must work with the states, tribes, and local governments to create a national wetlands program—not just a Federal program.

To create a national program we must recognize that there are effective state and local regulatory programs in place. In such cases the Section 404 program should not duplicate the regulatory actions of another level of government. The Federal government should instead work with the state or local government as a partner where each has clearly defined responsibilities and the Federal government maintains responsibility for programmatic evaluation of the state or local program. Existing authorities such as state assumption of the program authorized by EPA pursuant to Section 404(g) and programmatic general permits issued by the Corps provide the necessary vehicles for building this national program. The Corps is currently working with the states to develop programmatic general permit guidance—an approach that shows great promise.

The guidance will both encourage programmatic general permits and set the limitations on their use. The basic principle will be that if a state, tribal, or local regulatory program provides the same level of protection as provided by the Federal Section 404 program, and if such protection will be sustained in the future, the Corps should not duplicate such a program. If properly implemented, the environment will be better protected and the regulated public will be spared unnecessary, duplicative levels of regulation. The Corps will then be able to prioritize better its work—focusing on larger projects with potentially greater impacts.

EFFECT OF S. 605 ON THE SECTION 404 PROGRAM

Summary

S. 605 or similar bills would engender unjustified, but nonetheless, huge and virtually unlimited, claims against the Corps Civil Works budget. For the reasons set forth below, the Army would recommend that the President veto S. 605, if passed in its current form, or similar legislation. The potentially immense administrative and liability costs such laws would impose on the Corps budget would drastically affect the Corps' ability to carry on essential civil works functions such as responding to floods and other disasters, and protecting and enhancing the public interest through development and operation of water resources projects for navigation, flood control, and environmental restoration. Payments required by such laws would drain the Corps regulatory funds, making it impossible to continue protecting public health, safety, environmental values, and the overall public interest through administration of the Corps regulatory program (i.e., pursuant to Section 404 of the Clean

Water Act, Section 10 of the Rivers and Harbors Act of 1899, and Section 103 of the Ocean Dumping Act). Moreover, once all regulatory funds have been expended through the payment of claims, the Corps would be forced to cease operation of the program, leaving thousands of applicants and potential applicants unable to obtain permits for their activities that would affect waters of the United States.

The section 404 program protects private property rights

The Corps is committed to protecting the property rights of all landowners and operates its regulatory program accordingly. The legally binding regulations that govern the Corps regulatory program clearly establish respect for and protection of private property rights as one of the cardinal principles guiding all regulatory actions and decisions. See 33 C.F.R. §320.4(g) (stating that "[a]n inherent aspect of property ownership is a right to reasonable private use. However, this right is subject to the rights and interests of the public in the navigable and other waters of the United States, including the federal navigation servitude and federal regulation for environmental protection. ") This follows the basic common law principle that "no one has the right to use his or her property to harm another." As the Army, acting through the Corps of Engineers, administers its regulatory program, it reduces the impact of these important regulations on private property owners as much as possible, while still allowing the Corps to protect other property owners and the overall public interest.

As noted clearly in the statistics presented above, the Corps authorizes tens of thousands of activities annually, most with little or no delay or expense to the regulated public, but with general permit conditions to minimize adverse effects on neighboring and downstream landowners and on the overall public interest. Even for the larger-scale proposals that must be authorized by individual permits, the Corps annually grants approximately 10,000 individual permits, and denies only about 500; the majority are denials "without prejudice", made necessary by a state's denial of a water quality certification or coastal zone management certification. Thus, in the vast majority of cases, the Corps regulatory program authorizes owners of private property to use their land profitably, subject to reasonable conditions to protect the rights and property values of others, and the overall public interest.

One of the successful aspects of the Section 404 program is the ability of the Corps to balance the objectives of an individual landowner with the interests of other landowners that are potentially adversely affected by the filling-in of aquatic areas, and by other development-related impacts. In the vast majority of cases the permit applicant is allowed to accomplish his or her objectives in a manner that protects the interests of the other landowners and the public in general. Through this process the Corps must consider fully how a particular action not only affects the environment but how it affects other people. For example, the loss of important wetlands may harm the quality of water in the Chesapeake Bay, which in turn would reduce blue crab populations, which would do economic harm to the region.

We have observed first hand numerous examples around this Nation where the Section 404 program has protected the rights of property owners. For example, in Georgia, through the Section 404 program a developer was required to mitigate for the illegal, unauthorized filling of wetlands that resulted in the flooding of adjacent property owners. The homeowners in the affected subdivision expected, and in fact demanded, that the Corps and EPA enforce the Section 404 program in this case.

Even though the Corps operates its regulatory program in a manner that is highly respectful of the rights of private property owners in the vast majority of cases, upon rare occasion an incident occurs in which private property rights may appear to be insufficiently considered. The Corps regrets those rare deviations from the normal operation of the program, and tries to correct them whenever they are discovered.

Enactment of S. 605 would create overwhelming problems

The general problems associated with S. 605 and similar "takings" bills have been explained in the written statement of Mr. John R. Schmidt, Associate Attorney General, Department of Justice (DOJ), presented to this Committee on June 27, 1995. We support the DOJ position regarding why those "compensation" bills would allow and encourage a vast number of unjustified claims against the government.

In the opinion of the Army, the inflexible terms of S. 605 and similar bills are unworkable. They would impose an unmanageable administrative burden and cause the Corps to cease to protect the public interest through the regulatory program (i.e., by ceasing to impose permit conditions, permits denials, enforcement actions, etc.), or, alternatively, to subject the Corps Civil Works budget to a growing, practically limitless number of potentially large claims. These could amount to many hundreds of millions of dollars, perhaps billions, every year. Furthermore, the in-

flexible terms of S. 605 and similar bills would result in many or most of those claims being paid from funds appropriated for operation of the Civil Works program.

If S. 605 or any similar bill were to become law, it would invite and encourage a multitude of individuals to file claims against the Corps, even though the vast majority of those claimants would not have a real economic loss or a reasonable grievance against the Corps, regulatory program. This is true for several reasons. For example, S. 605 would encourage speculators to purchase wetland and riparian property, and to subdivide larger tracts containing wetlands or riparian land, for the primary purpose of creating claims for the "affected portion" of property under the terms of S. 605. This new "land rush" to acquire and to "segment out" wetland property would quickly inflate the value of wetlands, not because wetlands are actually suitable for development, but because S. 605 would allow and encourage speculators to use wetland claims to exploit the Federal Treasury.

Similarly, S. 605 would encourage the owners of wetlands or riparian lands to generate bogus or highly speculative permit applications, or to seek unneeded jurisdictional determinations or enforcement actions, in order to create claims under the terms of S. 605. There is a substantial risk that the Corps would be forced to pay many (and probably most) of the anticipated myriad of claims, because the unreasonable terms and procedures of S. 605 would require that result. For example, S. 605 would *not* require claimants to document actual or clearly predictable losses in order to assert compensable claims, and the claims procedures of S. 605 would virtually ensure a recovery for any wetland property owner who can find a cooperative "qualified appraisal expert" (undefined in S. 605). Thus, S. 605 would force the Corps to pay claims that could amount to many hundreds of millions (or perhaps billions) of dollars yearly to claimants who would deserve nothing under the constitutional standards for "regulatory takings", or in terms of fundamental fairness or common sense. S. 605 invites wholesale exploitation and abuse of the Federal Treasury, would constitute a monumental "giveaway" of scarce public funds, and would cost huge sums merely to administer.

Because the terms of S. 605 would allow so many abuses, if that bill or any similar bill were to become law, it would create the risk of unjustified and virtually unlimited, claims against the Corps Civil Works budget, plus very large administrative costs. Presumably, the first effect of S. 605, would be that the Corps would no longer have sufficient funds to support the regulatory personnel who process and issue the tens of thousands of separate Corps regulatory authorizations that U.S. citizens need every year so they can legally carry on their legitimate activities in or affecting the waters of the United States. The budget for the Corps regulatory program is \$101 million for Fiscal Year 1995, with approximately 70 per cent of that budget going to pay the salaries of the Corps regulatory personnel. Because the numerous multi-million dollar claims engendered by S. 605 would soon force the Corps to eliminate the regulatory staff for lack of funds to pay them, U.S. citizens would soon have to defer activities subject to regulation indefinitely, or proceed with their projects without the needed permits, thereby endangering other landowners and the environment, as well as breaking the law and subjecting themselves to civil and criminal enforcement actions, as well as injunctions resulting from CWA citizens lawsuits. Soon, however, the large and unjustified claims that S. 605 would engender would exhaust the limited budget of the Corps regulatory program itself, and would begin rapidly to deplete the Corps Civil Works appropriations needed for responding to flood control needs, navigation, shore protection, and environmental restoration.

Since 1968, when the Corps regulatory program began to provide reasonable and balanced protection for all aspects of the public interest (including environmental values such as wetlands), experience has shown that the Corps regulatory program deprives property owners of the use of their land so as to constitute a constitutional "regulatory taking" only in very rare and exceptional cases. Instead, in practically every case the Corps regulatory program allows the property owner to carry out a proposed project and to make economically viable use of his or her land, but in a manner that minimizes adverse effects on adjoining property owners, water quality, downstream flooding, and other public interest and environmental values. For any case where a landowner feels aggrieved, the Tucker Act and the U.S. Constitution guarantee him or her the right to bring suit in the Federal courts to seek compensation under the Fifth Amendment, or other legal relief. If the property owner's claim of a "regulatory taking" is meritorious, he will not only receive full compensation, with interest, but also reimbursement for all of his attorneys' fees under 42 U.S.C. 4654(c). Clearly, the Tucker Act, the U.S. Constitution, 42 U.S.C. 4654(c), and the Federal courts already adequately protect aggrieved property owners, so the additional provisions of S. 604 and similar bills are unnecessary. The fact that over the years very few court decisions have held that the Corps regulatory program resulted

in a constitutional taking reflects the facts that the regulatory program in the vast majority of cases accommodates the legitimate development goals of the regulated public, and respects the needs and rights of private property owners.

If enacted, S. 605 would make it virtually impossible for the Corps to continue to protect the public interest through its regulatory program, and in fact, to operate that program at all, for the various reasons indicated in this statement. For example, S. 605 would radically change the established legal standards governing when the denial or conditioning of a Corps permit would require Federal compensation. The end result would be that for the many thousands of times every year when the Corps is required by statute and by legally binding regulations to condition a permit, bring an enforcement action, make a jurisdictional determination, or deny a permit application, thereby restricting the ability of a property owner to fill in or otherwise destroy any area of the waters of the United States, the affected property owner could (and presumably would) demand compensation under the terms of S. 605. Moreover, under the new rules of law and procedures created by S. 605, a property owner/claimant often would be able to obtain compensation from Corps funds, no matter how small the area or interest protected compared to the total area developed, no matter how grievous the harm to public interest caused by the landowner's proposed activity, and whether or not the landowner's proposal or claim was actually supported by reasonable, investment-backed expectations, fundamental fairness, or by common sense.

Section 501—The findings that underlie the bill are inaccurate and misleading

Section 501 of S. 605 refers to the protection afforded to property rights under the Fifth Amendment to the Constitution, and states that the Section 404 program has been implemented "in a manner that deprives property owners of the use and control of their property." These findings might be read to suggest that regulation under the Section 404 program routinely interferes with constitutionally protected property rights. As to the Section 404 program, an August, 1993, report of the U.S. General Accounting Office found that of the 13 cases decided by the Claims Court (now the Court of Federal Claims) involving the Section 404 program as of May 31, 1993, only one resulted in a final judicial determination of a taking that required compensation under the Constitution. (One other case was settled prior to decision by the court.) It is thus inaccurate to suggest that the Section 404 program has significantly impaired constitutionally protected property rights.

Section 501(a)(3) of the bill states that property owners are being forced to resort to expensive and lengthy litigation to protect their constitutional rights. Yet the President's comprehensive Federal wetlands policy, announced in August of 1993, contains several features designed to reduce the time and expense of challenging wetlands determinations, such as allowing administrative appeals of jurisdictional determinations, permit denials, and administrative penalties. The 1993 wetlands policy also requires most permitting decisions to be made within 90 days. Moreover, the relative lack of success of takings challenges to regulatory actions under the Section 404 program suggests that the length and expense of these cases is attributable, at least in part, to their lack of merit.

Section 501(a)(8) of the bill incorrectly suggests that the Section 404 program is unrelated to the protection of human health and public safety. In fact, wetlands enhance flood control, protect against coastline and riverbed erosion that might threaten public safety, and filter out pollutants that would otherwise contaminate our Nation's drinking water and waterways.

Section 503—The requirements in section 503 would undermine the stated purposes of the bill

Section 501(b) states that the purpose of the bill is "to provide a consistent Federal policy" for the protection of private property rights and other constitutional rights. Yet section 503 of the bill would undermine such consistency. Section 503(a) states that, in implementing the ESA and the Section 404 program, "each agency head shall comply with applicable State and tribal government laws, including laws relating to private property rights, and privacy * * *." This requirement would lead to inconsistent Federal policy because the states and tribal governments have different, and perhaps even conflicting, laws relating to property, privacy, and other matters. (Ordinarily, nationwide consistency in Federal legal policy is advanced by Article VI of the Constitution, which provides that the Constitution and Federal laws are the supreme law of the land, notwithstanding any conflicting state law.) Moreover, to the extent that section 503(a) is intended to waive Federal supremacy, we question whether the language employed is sufficient under applicable Supreme Court case law. See generally, *U.S. Department of Energy v. Ohio*, 112 S. Ct. 1627 (1992); *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992).

Section 503(a) requires that the Section 404 program be administered "in manner that has the least impact on private property owners constitutional and other legal rights." It is not clear whether this provision is aspirational or enforceable. In addition, the "least impact" standard ignores the fundamental truth that environmental protection necessarily involves a delicate weighing of competing concerns. This standard might be read improperly to elevate a property owner's individual rights over and above the public's legitimate interest in the protection of human health and the environment.

S. 605 would create huge new bureaucracies and countless lawsuits

S. 605 would also require the creation of huge and costly bureaucracies to address compensation requests. Title II would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Title V would establish an administrative compensation scheme with binding arbitration at the option of the property owner.

Agencies would need to hire more employees to process compensation claims, more lawyers to litigate claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property values, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less.

The takings impact analysis requirement In title IV would create massive and costly bureaucratic red tape

Section 403 (a)(1)(B) of the bill would require all agencies to complete a private property taking impact analysis (TIA) before issuing "any Policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property." The Administration firmly believes that government officials should evaluate the potential consequences of proposed actions affecting private property, and we currently do that pursuant to Executive Order No. 12630, issued by President Reagan.

Because S. 605 would establish such a broad definition of "taking," however, Title IV would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of Corps operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. At a time when the Administration is reinventing government to make it more streamlined and efficient, Title IV would result in "paralysis by analysis" and generate a vast amount of unnecessary red tape.

The specific requirements of section 404 of S. 605 are also disturbing. Among other things, it would require agencies to reduce actions that are compensable under the Act to "the maximum extent possible within existing statutory requirements." By elevating property impact above all other legitimate goals and objectives, section 404 of S. 605 would inevitably lead to less effective implementation of any Federal program that affects property rights.

The bill's enforcement mechanisms are unclear, but section 406 of the bill suggests that actions could be filed in Federal courts to enforce the TIA requirement. Opponents of any government action would use legal challenges under the bill to delay or defeat the action by challenging whether an analysis must be done, whether every person with an interest received notice, and whether the analysis is adequate. Such litigation would result in an enormous additional burden on the Federal Courts' already overburdened docket.

The administrative appeal provision

Section 506 and 507 of the bill would require the issuance of rules to establish administrative appeals for various regulatory actions under the Section 404 program. The Administration has already decided to provide administrative appeals for a number of these actions, including Section 404 jurisdictional determinations, permit denials, and administrative penalties. A proposed regulation that will establish this appeals process will be published within the next few weeks for public review and comment.

We believe, however, that it is ill-advised to require administrative appeals for certain actions specified in the bill. For example, "cease and desist" orders and other compliance orders under the Section 404 program may sometimes require a property owner to restore or otherwise alter property. Under current law, an administrative compliance order under the Section 404 program is not subject to judicial review unless and until the property owner refuses to comply with the order, at which point the DOJ decides whether to attempt to enforce the order in Federal court. This sys-

tem often results in prompt compliance and remediation, but allows for judicial review if the owner believes that the order is improper. An administrative appeal, as required by section 506, would create an unneeded and burdensome bureaucratic review that would disrupt this streamlined process, have a chilling effect on prompt compliance, and prelude a quick enforcement response to threats to human health and the environment.

CONCLUSION

As currently administered, the Section 404 program respects the rights of the Nation's property owners. The vast majority of landowners are allowed to use their property and realize their development expectations—in a manner that protects important aquatic resources. An often overlooked aspect of the "property rights" debate is the impact on other property owners of filling wetlands. We have observed first hand where the Section 404 program has protected the rights of adjacent and downstream property owners from flooding and other problems. In this regard, we must recognize that fairness to landowners extends to all landowners and that individuals do not have a right to harm their neighbors.

Our position is that not only are S. 605 and other proposed compensation bills unwarranted, but also that they would have serious adverse effects on the Corps regulatory and Civil Works programs and on the general public. For the reasons set forth in this statement, the Army strongly opposes S. 605.

As previously noted, we recognize that the Section 404 program can and should be improved to make it more fair, flexible, and effective. This Administration, like no other before it, has taken the initiative to address the legitimate concerns of all landowners. We would be happy to work with this Committee to facilitate additional improvements without disregarding the need to protect the overall public interest, including the Nation's aquatic resources. Mr. Chairman that concludes my statement. I will be happy to answer any questions you or the Committee members may have.

PREPARED STATEMENT OF GARY S. GUZY, DEPUTY GENERAL COUNSEL, U.S. ENVIRONMENTAL PROTECTION AGENCY

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Thank you for the opportunity to testify today on proposals to automatically compensate property owners far beyond what the Constitution provides. In my testimony, I will examine in some detail the effects of various legislative proposals, to demonstrate how such proposals are a misguided response to concerns about environmental and other regulation on property owners and sweep so broadly they will seriously undermine critical health and safety protections. Pending legislation would undermine our many successes in health and environmental protection of the past 25 years and render our future challenges perhaps impossible to meet. The American people neither can afford nor desire any of these results, and, for these reasons, EPA would recommend that, in its current form, the President veto S. 605 or similar legislation. I will also focus on the Administration's efforts to address such concerns using a more carefully targeted approach to achieve the goal I know we all share, of ensuring effective public health and environmental protection while respecting and enhancing the property rights of all Americans.

Let me begin by stating the obvious yet important predicate for our approach, which is that the Administration is strongly committed to private property rights, both because the Constitution protects them and because we believe they are a cornerstone of a free society. Those who have suggested that the Administration, because it opposes compensation bills, is somehow hostile to the Fifth Amendment either do not understand the Fifth Amendment or do not, or are unwilling to, understand the Administration's position.

I. Environmental Regulation Today

For more than a quarter of a century, the Environmental Protection Agency (EPA) has been implementing environmental laws that provide protections for all Americans—protection of health from crippling air pollution, disease-causing drinking water, dangerous toxic emissions and hazardous waste disposal. These efforts have been effective. We no longer have rivers catching on fire. Water bodies that used to be virtual sewage dumps are now vital, thriving places where people swim and fish—Boston Harbor, Santa Monica Bay, Puget Sound.

Our skies are also cleaner. In virtually every city in this country, the air is cleaner than it was 25 years ago. Smog and carbon monoxide are down. By banning lead

in gasoline, we reduced the level of lead in the air by 98 percent and protected millions of children from permanent mental damage. In just the last two years, we have reduced toxic air pollution from chemical plants by 90 percent. We've protected the public and the environment from toxics, such as DDT. Industrial emissions of toxic chemicals have decreased, hundreds of toxic dumpsites have been cleaned up, and the creation of new hazardous sites has all but halted. Today's new cars use only a third as much gas and emit 90 percent less pollution. All across the country, big industries and small, now recognize that pollution control and prevention is part of doing business responsibly and critical to our nation's health and economic success.

Nevertheless, we need to protect these gains, and to recognize that many environmental problems still remain to be solved. With all the progress we've made, 40 percent of our rivers and lakes are still not suitable for fishing or swimming; more than 1000 warnings are in place, telling people not to eat the fish they catch in their local streams. Thirty million people in the U.S. get their drinking water from systems that do not meet public health standards. In Milwaukee, hundreds of thousands fell ill from contaminated drinking water, and 100 died. Asthma is on the rise, and 40 percent of the population still lives in areas where the air is dangerous to breathe. One in four Americans lives within a few miles of a toxic dump.

So much work remains to be done. Compensation bills would cripple EPA's efforts to address remaining problems, and threaten to undo the successes we have had. While not outwardly admitting this result, this legislation would fundamentally re-examine the most basic premises for tough and protective national environmental standards.

II. Problems With Automatic Compensation Bills

Our difference with proponents of compensation bills is not over the end, protecting private property rights and ensuring that the guarantees of the Fifth Amendment against uncompensated takings of private property are fully implemented, but with the means for doing so. I believe compensation bills do not allow us to strike the balance the Constitution provides between the needs to protect our nation's environment and to protect private property; instead, they force the false choice of doing one or the other as if the two were mutually exclusive. In reality, a healthy environment is critical to protection of property values, which depend in large measure on clean air, safe water, and the like. In the long run, compensation bills will seriously undermine environmental protection, and thus reduce protection for all private property, particularly for America's homeowners, nearly 95 percent of whom live on lots of five acres or less. Moreover, it is the genius of our constitutional system that we can protect both private property and vital public interests.

There are two principal compensation bills now under consideration. HR 925, passed by the House, has a purported compensation threshold of 20 percent, defines property to include land and water rights, and applies to federal action to protect wetlands and endangered species (and to certain federal water programs). S. 605, which is now before the Senate Judiciary Committee, has a purported 33 percent compensation threshold, and applies to any federal action (and some state actions) affecting any type of property.

Despite their differences, the bills are based on common, flawed assumptions that mean they will adversely affect property owners and the public. I will emphasize in particular four principal problems with compensation bills. First, they reject the Fifth Amendment effort to provide fairness to the property owner and the public, in favor of a one-size-fits-all mechanical formula that effectively creates an entitlement for property owners whenever certain conditions are met. Second, because they provide only narrow, nuisance-based exceptions to the compensation requirement, in many cases, they will force the government to choose between paying polluters not to pollute and tolerating activities that harm or threaten public health, safety or welfare. Third, they will undermine the careful balance Congress has struck in individual environmental statutes and needlessly complicate the regulatory process. Finally, they will create perverse incentives that will discourage cooperation between government and property owners to find constructive ways of protecting the environment while meeting the needs of property owners.

1. NO ATTEMPT AT FAIRNESS

The Fifth Amendment standard for compensation is fairness: whether, in light of all the circumstances, it is fair that a particular property owner should bear the cost of regulation, or whether that cost should be borne by the public as a whole. Compensation bills, however, reject this standard in favor of an extreme formula that

would pay out billions of taxpayer dollars without regard for whether compensation is fair to the public or the property owner.

The bills' most radical departure from the Constitution is in providing compensation solely on the basis of a mechanical formula purportedly assessing the economic impact of the regulatory action on the regulated property. This formula does not explicitly consider, among other important factors, the price the owner paid for a property, the expectations the owner had when acquiring the property, whether the use the owner proposes is reasonable under the circumstances, or whether the owner is able to earn a reasonable rate of return on the property. This could force EPA to spend huge sums for compensation, regardless of whether or not compensation is fair to the property owner or the public. It could even compensate property owners who continue using their property as they always have, for example for agriculture, while claiming compensation for regulation that prevents them from making some other more lucrative use, such as commercial development.

The focus on an "affected portion" of property also rejects any consideration of fairness. It would require compensating the owner of a 1000 acre parcel for regulation affecting a single acre wetland on that parcel if the wetland is claimed as the "affected portion." In many cases, owners who have suffered a minor loss will be able to "segment" their property, to establish a loss of 20 percent, 33 percent—or even 100 percent—to a specific "portion," and the bills identify no limits to how small a portion can be considered. In practice, this will mean that virtually any federal regulation can trigger compensation.

A focus on the whole parcel, rather than just an affected portion, is necessary to ensure fairness. Thus, the owner of a large tract, some fraction of which has been subject to restrictions, is still likely to be able to make productive and profitable use of the land. Indeed, with adaptive and innovative modern techniques stimulated by local land use regulation, such as clustering of housing units to preserve open space, owners often end up with developments that are highly profitable and attractive to buyers, even though not every acre can be developed. Such owners should not be compensated.

Compensation bills are also unfair to taxpayers because they ignore the role of regulation in creating and protecting property value. They force the taxpaying public to compensate property owners when regulation limits changes in use that enhance value, but do nothing to assure the public a share of the benefits when government action—as it so often does in our complex society—increases property value by providing infrastructure and protecting public order, human health, and the quality of the environment. In addition, compensation bills effectively force the government, that is, the taxpayers, either to pay property owners for following the law or to refrain from enforcing the law. This will inevitably erode government's ability to use its regulatory authority to protect and enhance property values for all property owners.

S. 605, with its exceedingly broad reach, ignores other aspects of fairness as well. The bill's broad language opens the possibility that private parties can create or define property by forming "understandings," by invoking "custom" or "usage." This could mean, for example, that where permits are typically renewed, a property owner might invoke "custom" to claim a property interest in a renewal or where an activity has been tolerated in the past, owners might invoke "usage" to demand compensation for future restrictions on the activity. Even if such claims are ultimately rejected by the courts, the bill's vague and open-ended definition of property will create chaos and confusion in the meantime.

Equally radically, S. 605 also would pay property owners for economic impacts that have never been protected by the Fifth Amendment. Specifically, the bill could provide owners with compensation for "business losses." It is difficult to assess the impact or define the practical limits of the unprecedented suggestion that it is somehow the job of the government to insure against all "business losses."

2. NUISANCE

A. A narrow exemption

The compensation bills include specific exemptions that, because of their narrowness, ambiguity, or both, will not allow for adequate protection of human health, public safety, the environment, and other vital concerns. As a result, in many cases they would force the federal government to pay property owners to refrain from activity that is harmful to society, in some cases paying polluters not to pollute; this would seriously undermine effective environmental protection.

Both bills relieve government of the obligation to provide compensation when it regulates activities that constitute nuisances under estate common law principles. While this exemption sounds like a simple, straightforward way of avoiding com-

pensation to persons engaging in activity that is harmful or socially unacceptable, it is anything but. In practice, the nuisance exception may not reach many such activities. This exemption goes to the heart of Congress' long-standing rationale for enacting federal health and environmental protections in the first instance—to address problems that could not be adequately or uniformly addressed under state nuisance law.

For example, some courts have rejected state nuisance claims seeking to remedy the problems created by leaking landfills or underground storage tanks or activities on one property that caused flooding on a neighboring property—even where these might be plainly covered by federal environmental legislation. The nuisance exception in these bills would typically apply only to actions that cause demonstrable immediate harm to specific property. Thus it may not reach actions whose health and safety risks are *long-term*, as is often the case with discharges of pollution into air, land, or water. Similarly, it may not cover actions whose principal threats to health and safety are *cumulative*, as where an individual use of a pesticide or discharge of a pollutant does not, by itself, cause significant harm, but the frequent repetition of the action has serious consequences.

Similarly, nuisance law may not fully protect those who might be particularly sensitive to the harmful health effects of pollution, including children, pregnant women, and the elderly. Further, it may not apply to actions whose harms are suspected but have not been conclusively documented, forcing the public, rather than the property owner, to bear the risk of any uncertainty. Finally, some critical public safety activities, such as interstate pollution, are governed solely by federal law, and thus would not be covered by a state nuisance law exemption. In addition, nuisance law is notoriously uncertain; far from establishing a bright-line standard, a nuisance test will make it more difficult for both regulators and property owners to determine what actions can be regulated without compensation. Finally, since nuisance law varies from state to state, a state nuisance exemption could lead to major differences in the level of environmental protection from one state to another—and an intrusive look by federal assessors and federal courts at how state nuisance provisions should be interpreted for purposes of this legislation.

HR 925 also exempts regulation whose “primary-purpose * * * is to prevent an identifiable” “hazard to public health or safety; or damage to specific property.” The “hazard” exemption is apparently meant to cover activities that would not come within the definition of nuisance. However, the exemption is worded in novel language whose meaning is unclear. Thus it may not apply to activities that will reduce or control a hazard but cannot “prevent” it entirely. It is also unclear at what point a long-term or cumulative risk constitutes an “identifiable” “hazard” or what constitutes “identifiable * * * damage to specific property.”

Ultimately, the “hazard” exemption raises many of the same issues concerning cumulative and long-term impacts as nuisance law, and it seems more likely to create confusion and uncertainty than to remedy the limitations of nuisance law.

B. Compensation to prevent harmful activities

Particularly with S. 605, the limitations of the nuisance exemption could require EPA to compensate a wide variety of restrictions imposed to protect public health, safety, and the environment by controlling pollution.

For example, under S. 605, taxpayers could be forced to pay staggering sums to the owners of industrial sites to refrain from emitting damaging air pollutants. Title I of the Clean Air Act requires that major new sources of air pollutants wishing to locate in areas that are already in violation of air quality standards must obtain “offsets” of pollutants from other sources so that the total quantity of pollutants in the area does not rise. This increases the costs of operating facilities, and thus could give rise to claims under S. 605. Moreover, this restriction would be unlikely to fall within the nuisance exception because the effects of these pollutants are cumulative, long-term, and widely dispersed, and because their emission is tolerated under certain circumstances. Similarly, in order to control damaging acid rain, EPA requires “allowances” of sulfur dioxide emissions; EPA will reduce these allowances over time. Such pollution may be transported over large distances, cumulate the effects from many sources, and be influenced by complex weather patterns so any one activity may not alone be immediately damaging, or any one state’s nuisance provisions may not suffice to be protective. Under similar reasoning, this program could give rise to compensation claims.

To protect the public, EPA also imposes requirements for accreditation, training, and notice for lead and asbestos removal. Businesses could seek compensation for the increased costs of worker training and more costly removal processes and any resulting reduction in profits, and home and apartment owners could claim that the notice requirement affects the marketability of their property. Because these pro-

grams address hazards that are primarily long-term, they might not come within the nuisance laws of some states. However, they provide protections vital to public health, especially for children, who are particularly vulnerable to the hazards posed by lead and asbestos.

EPA also imposes critical restrictions on uses of pesticides and similar products, in some cases with outright bans, such as for DDT, and sometimes by restricting use. Such restrictions arguably may reduce property value and trigger compensation claims. Moreover, because the principal effects of some of the regulated products are cumulative, such restrictions might not fall within an exemption based on state nuisance law.

Further, EPA sometimes imposes uniform national regulations to ensure an adequate margin of safety for the public. For example, to protect drinking water supplies, EPA requires the monitoring of groundwater near waste disposal facilities. If the monitors at a particular site established that no contamination had occurred, the operator of the facility could seek compensation for monitoring costs, using the evidence obtained from monitoring to demonstrate that, in fact, no nuisance existed.

Finally, to ensure full protection to the public and a margin of safety, some statutes and regulations require use of the best available pollution control technology. However, even though achieving such standards is feasible, if it reduces the profitability of a property, the owner could claim compensation and defeat a nuisance exemption if some other, less costly and effective standard would be adequate to avoid creating a common law nuisance.

Similarly, HR 925, even with its "hazard" exemption, will require compensation to prevent activities that interfere with the important functions wetlands perform in protecting the public. Specifically, in their natural state, wetlands enhance the ability of watersheds to absorb water without harmful flooding, and filter a wide range of pollutants, including pesticides and chemical fertilizers, from entering groundwater used for drinking. They also protect aquatic life, including fisheries on which many jobs may depend. It is ordinarily not possible to document with specificity the connection between a single wetland development activity and a specific instance of unusually severe flooding, degradation of drinking water, or lost productivity of a fishery (with resulting job losses). Thus, wetlands development often would not constitute a common law nuisance or a "hazard."

Nevertheless, wetland development activities have real consequences, not only for ecosystems in a general sense, but for very specific people whose safety and livelihoods depend on the ability of wetlands to continue performing their natural functions. At bottom, government does not engage in wetlands regulation to arbitrate between abstractions ("property rights" versus the "environment") but among the differing needs and rights of various people, many of them property owners, who will be affected in a host of ways by wetlands activities. The problem with compensation bills, which their exemptions do not solve, is that they fail to recognize this arbitration function. Instead, they use a rigid formula that mechanically tilts the balance in favor of one type of citizen, property owners seeking to develop their property, with only the most narrow consideration of the needs of others whose health, safety, economic security, and well-being may depend on restraints on development. In reality, the only way to find the proper balance, to protect the rights of all Americans, is by looking at each proposal on its merits, as sound regulatory programs do, as the courts do in takings actions, but as automatic compensation formulas most emphatically fail to do.

3. DISRUPTION OF CRITICAL PROTECTIONS

Despite the care and balance Congress has struck with each of its pieces of environmental legislation, automatic compensation bills will disrupt existing regulatory programs by creating uncertainty, confusion, and instability. Ultimately, this will cause regulatory gridlock, creating problems not just, for federal and state regulators, but for the regulated community as well.

S. 605 appropriates the language of regulatory reform legislation to impose "decisional criteria" that would create a "supermandate" elevating private property concerns above all others. The legislation would prohibit EPA from enforcing any legislation which might require an "uncompensated taking" as defined by the act. This vague provision, coupled with a required "lookback" at all existing regulations to redress any private property impacts, could serve as a bar to critical protections despite Congress' considered judgment that EPA is required to impose necessary and appropriate limitations on property use affecting others.

Providing automatic compensation under the bills, in addition to costing taxpayers billions, will drain EPA program budgets and significantly reduce EPA's ability to perform its mission of health and environmental protection, as mandated by Con-

gress. Both bills direct, with varying degrees of specificity, that compensation payments be made out of funds appropriated for agency operations.

As a result, a large number of claims—or a few large claims—against a particular program could threaten the operation of that program. Thus, if, for example, the Clean Water Act Section 404 program or the pesticide licensing program exhausted appropriations by paying compensation claims, they could be forced to suspend operations. This may mean that no permits could be issued for use of wetland property or no licenses could be granted for use of new pesticides. More generally, to the extent an agency diverts resources from implementing a program to compensating property owners, it will have fewer resources to assist property owners, by providing them with information or processing permit applications.

Proponents assume compensation bills will cut-down regulation because regulators will feel the economic pain of paying claims. If this does occur, the Agency will effectively be compromising environmental protection for the entire public, in order to reduce regulation of the property of a few property owners. However, in many cases cutting back on regulation may not be a realistic option for the Agency because the environmental consequences of such cutbacks would be intolerable and because Congressional mandates may compel the Agency to act, and leave it without the discretion to refrain from acting. Finally, attempts to cut back on regulation may be subject to judicial challenge by citizens who believe the reduced regulation does not satisfy the Agency's legal obligations. The net result will be to create regulatory instability and uncertainty.

In addition, a vast compensation bureaucracy of appraisers, negotiators, arbitrators, and litigators will be needed to establish and administer a compensation and detailed assessment program. The costs of creating this new bureaucracy would also be borne by the Agency, presumably-coming out of its operating budget, which would further reduce money available to discharge its responsibilities for protecting health and the environment, including issuing permits.

In addition, the bill would also allow litigation to enforce its assessment and other prescriptive requirements at any time within six years of the challenged action. This will create enormous disruption and uncertainty, by fundamentally altering longstanding and carefully tailored "preclusive review" provisions in many environmental statutes.

For example, under the Resource Conservation and Recovery Act, any challenge to a final rulemaking must be filed in the Court of Appeals for the D.C. Circuit within 90 days of the publication of the final rule. 42 U.S.C. Section 6976. After that time, the legality of the rule cannot be challenged. Such provisions ensure that challenges to these regulations are heard swiftly, providing certainty to both regulators and regulated entities, including, the State agencies that adopt the federal regulations over time. S. 605 arguably would extend to six years the time for challenging an agency action.

A court action that invalidates a rule after many years can throw a whole program into chaos—the rule could already have been adopted by dozens of states, applied in numerous administrative and enforcement actions, incorporated in hundreds of permits throughout the nation, and used as the basis for additional, later regulations.

In addition, S. 605 includes a provision that could fundamentally and adversely reorder the carefully crafted relationship between the federal and State governments. Congress has directed in the implementation of environmental programs. This provision would require the federal government to provide compensation for action by a State agency that: carries out or enforces a program required under federal law; is delegated administrative or substantive responsibility under a federal program; or receives federal funding to implement a state regulatory program.

The impact of this liability scheme will be devastating to State/federal relationships in implementing federal and state environmental programs. Currently, in large part, State agencies administer the major environmental programs, including the Clean Water Act, the Clean Air Act, and RCRA. Consistent with the express intent of Congress in enacting these laws, EPA has developed strong partnerships with State governments and has, over time, delegated much of the day-to-day permitting, enforcement, inspection, and regulatory actions under these statutes to the States. The States also receive federal grants to administer these federal environmental programs and to develop state environmental programs.

Whether it be all of the state planning and pollution control requirements under the Clean Air Act's State Implementation Plans (SIPs) or the issuing of RCRA hazardous waste permits, EPA could no longer—under S. 605—leave the basic administration of federal environmental laws to the States. These day-to-day State actions are likely to diminish "property" values, as defined by this bill, and thus could create enormous financial liability for the federal government. Nor, for the same rea-

son, will EPA be able to provide federal funding to States to develop state environmental programs. Rather, to avoid federal liability for state actions, EPA would need to either withdraw authorization and funding of States to implement these laws or subject each State action to intense scrutiny. Since intrusive oversight is likely to be impractical for EPA and unacceptable to State program managers, withdrawal of funding and delegation seems more likely.

Withdrawal of delegation will lead to confusion and complexity in administration of these programs—for example, regulated parties will again be subject to the requirements of both federal and State law. Withdrawal of funding may create new “unfunded mandates” for State governments and may cripple developing State environmental programs.

S. 605 also contains a provision that could be read to impose broad restrictions on EPA entry onto private property, seriously undermining EPA's ability to investigate criminal activity and other violations of environmental laws that could endanger the public. One provision (§504) prohibits EPA from entering private property to collect information regarding the property without the consent of the property owner, while another (§505), restricting use, of data obtained on property, applies only to Section 404 of the Clean Water Act. Because Section 504 is not, by its terms, limited to the Clean Water Act, it could be construed to prohibit entry for purposes of implementing any agency regulatory program. Property owners who withhold consent to entry could thus prevent EPA from protecting public health by responding to chemical spills, assessing hazards from air or water pollution, or investigating sources of groundwater contamination, no matter how serious the environmental problem. Moreover, limitations on EPA's entry authority are unnecessary since existing law protects property owners from unwarranted property entry. Further, the requirement under Section 505 to provide owners with access to information collected on their property before using that information to implement Section 404 of the Clean Water Act would further undermine Section 404, particularly where the information at issue is part of a criminal investigation.

4. DISRUPTION OF POSITIVE INNOVATIONS IN ENVIRONMENTAL MANAGEMENT

The bill will create perverse incentives that discourage cooperation between property owners and regulators to find ways of allowing development while protecting the environment. It guarantees compensation for projects that violate regulatory requirements, and creates strong incentives to maximize the impact of regulatory restrictions (to increase compensation claims), while doing nothing to encourage projects that comply with regulations.

Now, when a proposal will lead to environmental problems, the Agency and the property owner often can work to find ways to modify the project so that it proceeds without undue environmental impact. For example, a wetlands development proposal might be, modified by changes that reduce its impact on the wet land or that create wetland values elsewhere to “mitigate” the impact of a particular development. Ideally, this can produce co-operative “win-win” solutions that allow the owner to achieve all or most of the objectives of the project while minimizing harm to the environment. Creating such solutions is a key element of this Administration's efforts to reinvent government.

The bill's perverse incentives would stifle efforts to find such solutions. Owners who, refuse to cooperate are rewarded by being fully compensated for the value their property would have if it were completely unregulated. By contrast, cooperative owners may find themselves worse off for accepting and accommodating themselves to the costs of regulation, particularly if their cooperation causes the impact of regulation to drop below the compensation threshold.

Even more perversely, the bill rewards proposals that are not realistic or feasible. Ordinarily, an owner who proposes to make a particular use of a property must finance the project, risking capital, with the possibility that the project will lose money. Sound projects often succeed, and their developers profit, while imprudent ones likely fail. Under this bill, however, a property owner can avoid financial risk entirely by proposing a project that would violate government regulation and then claiming compensation.

III. Regulatory and Wetlands Reform

Compensation bills are offered as a “solution” to “problems” whose existence is supposedly demonstrated by widely circulated anecdotes off property owners frustrated, by government regulators. These anecdotes almost invariably describe government actions in the past, during previous Administrations. In addition, the anecdotes, which are often incomplete or misleading, are offered in place of sound data documenting the adverse economic impact of regulation. In fact, the available data

do not support the claim that government regulation is having a widespread, devastating effect on property values. However, the Administration recognizes that regulation could be more efficient and has created difficulties for some small businesses, farmers, and homeowners. We are strongly committed to reducing those difficulties by achieving our nation's health and environmental goals through cheaper, smarter, more flexible, and less intrusive means.

We believe that the best approach to legitimate concerns of property owners is to create meaningful regulatory reform—in this way avoiding excessive and unfair burdens on property owners in the first instance. We at EPA have undertaken important efforts to reduce the burdens on small businesses and other property owners by focusing on ultimate environmental goals and enhancing the flexibility of those who are regulated in achieving those goals and reporting on their activities. Our recent Superfund policies for prospective purchasers concerning contaminated aquifers—issued just last week and designed to tailor EPA's actions to truly liable parties while freeing other property owners to put their land to productive use—are perfect examples of this approach.

The hallmark of this Administration has been our efforts to bring together all affected parties to find comprehensive common sense solutions to environmental problems—such as with our Common Sense Initiative. Unfortunately, S. 605 and similar legislation threatens to adversarialize the process and accomplish just the opposite—by creating perverse incentives for property owners to either use their property in conflict with their communities, or to be compensated for their inability to do so.

On March 16, 1995, President Clinton announced the Administration's program to reinvent environmental regulation. Under this program, EPA is working on a set of 25 high priority actions designed to address problems with existing regulations and develop innovative alternatives to the current regulatory system. Many of these actions are specifically designed to aid small businesses' and property owners' compliance with environmental regulations.

Among the priority items are policies which will rely on market-based incentives to enhance efficiency in environmental protection—such as air emissions and water discharge trading; reforming basic programs to correspond to good science—such as refocusing RCRA and the drinking water program on the highest risks; building partnerships with states, tribal governments and local communities through more flexible funding mechanisms and grants; cutting red tape by reducing paperwork requirements in all programs; encouraging compliance with environmental laws by providing incentives for self-policing and assistance to small businesses and communities; and providing greater public access to EPA information.

EPA is also developing alternative regulatory compliance strategies to help small businesses and property owners. EPA is sponsoring demonstration projects that encourage technological innovation and develop new, more flexible management tools for compliance, such as third-party audits and multi-media permitting.

As for wetlands, I believe our nation's wetlands protections are working for the vast majority of Americans, particularly our nation's 64 million homeowners, nearly 95 percent of whom live on parcels of five acres or less. They are working because they provide critical protections that *all* property owners need—such as preventing flooding and cleansing pollution—at the same time the vast majority of property owners with wetlands are able to use their property as they see, fit.

The wetlands program is a good model of the economy and environmental protection working hand in hand. Of the estimated 100,000 activities that occur in wetlands areas annually, half are covered by general permits that do not require the property owner to notify the federal government at all. Of the 48,000 who do apply for permits, most hear back within days, and can do as they desire with their property. Indeed, only 0.7 percent of requested permits were denied.

That is not to say that the wetlands program always works as well as it should—it has at times frustrated small landowners, farmers, and ranchers. As noted above, the Clinton Administration is reinventing the way it does its regulatory work by ensuring that its actions make good sense and are done fairly and efficiently. As part of this reinvention effort, the Administration has already taken extraordinary steps to reform the wetlands program. Nearly two years ago, the Administration—after intensive consultations with landowners, industry, states, tribes, scientists, environmentalists, and several federal agencies—instituted significant changes to the program. The Administration Wetlands Plan is a common sense, workable set of administrative initiatives designed to better coordinate Federal wetlands policy with State and local efforts, be more flexible for, the landowner, and be more effective in targeting protection at valuable wetlands.

As a reflection of President Clinton's understanding that projects on private property with minor impacts, should not be subject to the same detailed permit review

as more complex proposals that affect larger areas, the Administration has acted to reduce the regulatory burden on small landowners. In particular, two new approaches directly ease the regulatory burden on small landowners attempting to carry out routine projects on their property by eliminating or reducing permit review.

First, the Corps, in consultation with EPA, will soon issue a new nationwide permit that allows landowners to affect up to one-half acre of non-tidal wetlands for construction of single family homes without applying for an individual permit. This general, permit applies to actions to build or add on to a home, and also covers such features as garages, driveways, and septic tanks.

Second, EPA and the Corps have directed their field staffs to streamline the regulatory process for projects that do require individual permits. The agencies have made clear that those seeking to build or expand homes, farm buildings, or small businesses that affect less than two acres of nontidal wetlands will generally be required to look only on their own property for less damaging alternative sites for small projects; off-site alternatives need not be considered.

Along with these changes, EPA and the Corps have directed their field staff to be more flexible in wetland permitting, emphasizing that all wetlands are not the same, to reduce the regulatory burden on landowners who wish to accomplish projects with minor impacts. Also, the Administration is developing a Section 404 administrative appeals process so that individuals can seek review of jurisdictional determinations, administrative penalties and permit denials without having to go to court. In addition, the Administration's 1995 Farm bill guidance included proposals to use the programs of USDA in support of creating and using mitigation banks in agriculture.

The Administration Plan also endorses the expanded use of mitigation banks for compensatory mitigation under the Section 404 and Swampbuster programs within an environmentally sound management framework. The Clinton Administration is encouraging mitigation banking, especially when developed within the context of a watershed planning—effort, because it is an extremely cost-effective tool to reduce permit delays and provide greater certainty to permit applicants, while ensuring more environmentally-effective compensation for adverse project impacts. Draft national guidance was published in the *Federal Register* several months ago for public review and comment, with final guidance due out shortly.

Another key aspect of the Administration Plan is to reduce the regulatory burden on the nation's farmers. At the heart of this effort is a commitment across all Federal agencies to ensure that the Section 404 and Swampbuster programs, operate consistently and without duplication. The Administration has already taken key steps toward fulfilling this commitment by developing an agreement among EPA, and the Departments of the Army, the Interior, and Agriculture to ensure that the nation's farmers can rely on the USDA Natural Resources Conservation Service's wetlands jurisdictional determinations on agricultural lands for purposes of both programs. Secretary Glickman recently announced that all wetland determinations completed since the 1985 Farm Bill, including those determinations that agricultural lands are not wetlands, will remain valid for purposes of both Section 404 and Swampbuster. The Secretary's announcement also clarified that, until completion of the 1995 Farm Bill, new determinations will only be carried out at the request of the landowner.

In addition, the Administration's 1995 Farm Bill guidance proposed major changes to the Swampbuster provisions of the Food Security Act. These proposals include changing Swampbuster's emphasis from protection of individual wetlands in agriculture to protection of significant wetland functions and values using a set of flexible policies focused on making the program work for farmers.

Also, the Administration issued a final rule that affirms the exclusion of an estimated 53 million acres of prior converted croplands, as defined by the Food Security Act, from Clean Water Act jurisdiction. These are areas that, prior to December 23, 1985, were hydrologically manipulated, and cropped to the extent that they no longer perform the wetlands functions they did in their natural condition. In addition, the Corps is developing a nationwide permit that will allow farmers to convert wetlands on their farms without being subject to regulation under either Section 404 or Swampbuster if the conversion has no more than minimal environmental effects.

The Administration Plan recognizes the critical need to increase state and local roles in wetlands protection. This will move regulatory decisionmaking closer to the people regulated and the resource to be protected, reduce duplication among wetlands protection programs at different levels of government, and streamline the permit decision process. Last year, New Jersey joined Michigan in assuming responsibility for implementing the Section 404 program, and EPA is currently assisting

other states as they work toward program assumption; as I indicated earlier, provisions in S. 605 would effectively discourage approval of state operation of federal programs. The Administration also believes that wetlands management decisions need to be made within a broader watershed context that gives State and local governments more responsibility to anticipate, rather than react to, wetlands issues and to tailor solutions to local conditions.

The Plan also addresses concerns that the Section 404 program is not responsive to the unique circumstances in the State of Alaska. EPA and the Corps have responded by adding flexibility to implementation of the program in Alaska, for example by instituting a process to issue Section 404 permits for sanitation and wastewater projects in Native communities within 15 days. Over fifteen projects were permitted through this expedited process during the first year it was in place.

IV. Conclusion

I believe the Administration's reforms, if given a chance, will significantly alleviate the concerns of property owners over excessive health and environmental regulation. I also believe our reforms follow the right approach to addressing the needs of property owners identifying specific regulatory problems and developing appropriate ways to fix them.

To the extent Congress believes there are larger problems that cannot be addressed administratively, the solution is to make meaningful reforms to the substantive provisions of the statutes that govern the programs at issue. Such reforms should not take the form of providing automatic compensation—with its own set of severe problems—but of establishing ways to avoid takings concerns in the first place. Our Constitution and our statutory framework for public health and environmental protection have served our nation well, and we should be reluctant to substitute across-the-board simplistic solutions that will elevate rhetoric to unworkable public policy.

I would be pleased to answer any questions the Committee may have.

PREPARED STATEMENT OF ALICE M. RIVLIN, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE: Thank you for the opportunity to discuss the potential costs of takings legislation.

Congress is considering two major takings compensation bills. H.R. 9 would require payment to landowners for restrictions on real property imposed under the Clean Water Act, Endangered species Act, and water provisions under the reclamation laws and other public land laws. S. 605 would require payment to owners of real or personal property for reductions in the value of their property caused by virtually any governmental action.

Although OMB has not completed the complex task of estimating the Government-wide cost of S. 605, we have developed a preliminary estimate for the compensation title of H.R. 9—the more limited House bill. OMB estimates that H.R. 9 would impose about \$28 billion in new costs over 7 years, making it one of the largest mandatory programs created in recent times. Should S. 605 be enacted with its much broader provisions and scope, it would potentially cost several times the cost of H.R. 9.

To be sure, we believe in property rights and the payment of just compensation. But these bills go far beyond our longstanding constitutional tradition. They go beyond property rights and seek to pay people to obey the law. That is not a proper role for the federal (or state or local) government. We should not pay airlines for the time their planes are grounded to comply with airworthiness directives. We should not pay drug manufacturers when their products are recalled from the market. We should not pay polluters to install emissions controls. However, we can and should make it easier for people to obey the law and have their grievances addressed and answered more quickly. This Administration is working to do just that.

As I wrote in a recent letter to the senate, if S. 605 were presented to the president in its current form, I would coin the heads of nine other departments and agencies in recommending that he veto it.

WHAT IS A "TAKING?"

Generally speaking, property can be "taken" in two ways. First, the government can physically "invade" property; this type of taking occurs, for example, when the government constructs a highway that runs through a person's land. Second, prop-

erty can sometimes be "taken" as a result of government regulation that restricts how the property may be used.

This second type of taking—a regulatory taking—does not occur simply because government regulation has diminished the value of property; as a unanimous Supreme Court stated two years ago, "our cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." (*Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*.) Instead, the Supreme Court has applied a case-by-case analysis to determine whether a regulatory taking has occurred. It considers, along other factors, the activity sought to be regulated, the public purpose of the regulation, the reasonable expectations of the property owner, and the remaining economic uses of the property after the government has taken action.

ADMINISTRATION CONCERNS

We have three generic, interrelated concerns with the compensation bills before Congress:

1. The legislation would create a radical new regime of property entitlements that would encourage claims that have no basis in actual losses to property owners.
2. These claims could prove hugely expensive; in fact, the bills would create one of the most expensive new spending programs in recent history, costing taxpayers tens of billions of dollars.
3. Because these claims could be so expensive, the government no longer will be able to afford to take needed action to protect the public.

In addition, we have many specific concerns with this legislation. Supreme Court decisions have balanced the loss in a parcel against the value of the rest of the parcel. But under these bills, even if most of a property has risen in value due to a federal action, any small portion that has fallen in value due to this action could be the subject of a compensation claim.

Furthermore, these bills define "property" and other terms so broadly and vaguely, they encourage landowners to "game the system"—potentially resulting in an enormous number of claims. Under S. 605, the same piece of property could be the subject of multiple compensation claims under essentially the same law. The bill defines "owner" as a "possessor in property rights at the time the taking occurs", including when [a] the statute, regulation, rule, order, guideline, policy, or action is passed or promulgated; or [b] the permit, license, authorization, or governmental permission is denied or suspended." Thus, several different people could file claims for compensation: person "A", who owns the property when the law is passed, sells to person "B" who is a possessor at the time the rule is promulgated, who sells to person "C" who applies for a permit.

Because the bills do not require property owners who assert claims to document actual or clearly predictable losses, we would anticipate many unsubstantiated claims. S. 605 says compensation shall include both the fair market value of the property and "business losses." Property owners could stake claims for developments that bay never occur. For example, not all farmers plan to build shopping centers on their wetlands. Nevertheless, this bill would appear to allow all wetland owners to claim they want to build a shopping center and argue the claim should cover any business losses because they cannot do so.

COST ESTIMATES

The compensation title of H.R. 9 would create unprecedented, statutory private property rights and entitlements beyond those guaranteed by the constitution or in current laws. Because the legislation would not require owners to document actual or clearly predictable losses to assert claims, and would allow claims to be filed for alleged impacts on an "affected portion" of a property, taxpayer costs could be enormous.

How did we derive our cost estimates? OMB asked the agencies affected by H.R. 9 to develop estimates of claims exposure—the funds needed to satisfy all claims likely to be filed under the legislation. To be sure, due to administrative and judicial determinations, actual expenditures would be less than total claims exposure. On the other hand, the OMB estimates understate total taxpayer costs because they do not include agency administrative costs to process the claims; higher agency costs of managing the property that the Federal Government acquires under the mandated purchase program; interest on any successful claims; and costs to the judiciary when litigation was pursued.

We assumed a time lag between passage of the bill and payments, due to the need for agency action to trigger a claim, the agency's ability to process the claim, agency

funds available to pay the claim, and the percentage of claims moving to the courts—where a less timely resolution is anticipated. We assumed Congress would cot appropriate more funds for claim processing in 1996, but would appropriate funds (as an appropriated entitlement) in 1997 and after for payments and claims processing.

We assumed that from fiscal 1997–2002, all claims would start to be processed in the year they are submitted, and no backlogs will develop. We assumed that in 1996, half the claims would be processed, creating a backlog for the rest. Agencies would settle about 5 percent of them in 1997.

Generally, we assumed a 24-month processing time between claim submittal and payment. OMB and the agencies did not assume that more citizens would seek to get benefits by being regulated. Agencies did assume, however, that citizens now being regulated would become more combative, and less inclined to accept permit conditions.

Here are a few examples of the types of costs which would be incurred under both bills:

- Under the endangered Species Act, claims could be filed when the interior Department “lists species” and “critical habitat are designated,” or when incidental “take permits” are denied or conditioned upon undertaking a habitat conservation plan.
- Under the Wetlands Program, a landowner needs a permit to discharge dredged or fill material into waters of the U.S., including wetlands Compensation claims could potentially result when conditions are imposed on permits, when permits are denied, from enforcement actions implementing current permits, and from jurisdictional determinations that a particular parcel is a wetland.

Under the Swampbuster Program, to participate in federal farm programs, farmers must comply with the requirements of Swampbuster, which prevent them from converting wetlands into cropland. The swampbuster restriction has been part of farm programs since 1985 and comes into play only as a result of the farmer's choice to participate in the federal farm programs. Under these bills, some owners of wetlands that could be converted to farmland will submit claims for the loss of program benefits if they converted their wetlands.

Under the reclamation Acts, irrigators and municipal or industrial water users may claim that an Interior Department decision to release large amounts of water for flood control purposes adversely affects the user's ability to farm, supply customers, or meet water quality standards.

While we don't have estimates for S. 605, its broad scope would allow claims for a variety of Federal activities, including:

- recalls or seizures of adulterated or misbranded foods or drugs;
- bank regulatory actions, including imposition of capital requirements; and
- issuance of airworthiness directives that prohibit certain aircraft from flight under certain climatic conditions.

PAYGO IMPLICATIONS

These bills have PAYGO implications because they mandate compensation and do not make the Federal obligation-to-pay clearly subject to Congress appropriating the funds in advance for this purpose.

Since the costs would fall under PAYGO provisions of the Budget Enforcement Act, they could prompt a sequester of other mandatory programs, forcing automatic, across-the-board cuts in medicare, veterans' readjustment benefits, various programs that provide grants to States, child support administration, farm income and price supports, agricultural export promotion, student loans, foster care and adoption assistance, and vocational rehabilitation.

A BETTER WAY

Rather than pay people to obey the law, the Administration has sought to improve the government's social contract with its citizens. To that end, we have proposed changes in many Federal programs to make them more flexible, user-friendly, and more sensitive to their impacts on citizens. These include our proposed changes in the Endangered Species Act and the section 404 wetland program.

Joseph Sax, Counselor to the Secretary of Interior and Deputy Assistant Secretary for Policy who testified before you on June 27, detailed the changes that Secretary Babbitt has proposed in implementing the ESA. Let me stress that our intent is to

have fewer citizens need to approach the Federal government for ESA permits, and to have more certainty as to what the Federal program entails.

Similarly, we have launched changes to the wetlands program. I understand that the Army Corps of Engineers representative who is here today will discuss some of those changes, and that a more in-depth hearing is also scheduled for next week.

CONCLUSION

This legislation would create a massive new Federal spending program which would burden taxpayers, encourage an endless number of unwarranted claims against the Treasury, and seriously impair the ability of Federal agencies to serve and protect the public as Congress intended.

PREPARED STATEMENT OF JOHN R. SCHMIDT, ASSOCIATE ATTORNEY GENERAL, CRIMINAL DIVISION OF THE DEPARTMENT OF JUSTICE

I. INTRODUCTION

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Thank you for the opportunity to provide the Administration's views regarding so-called "takings" bills, particularly those bills that would replace the constitutional standard for compensation with what is, in our view, a radical and dangerous statutory compensation mandate. Although my testimony today will address compensation bills generally, to illustrate specific points I will occasionally refer to two pending compensation bills that have been at the focal point of the debate:

- (1) the "Private Property Protection Act of 1995," passed by the House of Representatives as H.R. 925, re-passed as part of a comprehensive regulatory reform bill, H.R. 9, and then referred to this Committee for consideration; and
- (2) S. 605, the "Omnibus Property Rights Act of 1995," which is being considered by the Senate Judiciary Committee.

It is sometimes worthwhile to state the obvious just to ensure that no one is laboring under any misconceptions. This Administration strongly supports the protection of private property rights. The right to own, use, and enjoy private property is at the very core of our nation's constitutional heritage and our continued economic strength. These rights must be protected from interference by both private individuals and governments. That is why the Constitution ensures that if the government takes someone's property, the government will pay "just compensation" for it. That is what the Constitution says. That is what the President demands of his Administration.

To the extent government regulations impose unreasonable restrictions or unnecessary burdens on the use of private property, this Administration is committed to reforming those regulations to make them more fair and flexible. We have already implemented a number of significant regulatory reforms to alleviate burdens on property owners, and we are developing additional ways to improve federal programs to provide greater benefits to the public while reducing regulatory burdens, particularly for small landowners. I will briefly describe some of these reforms later in this testimony. Other Administration witnesses will discuss these reforms in greater detail in subsequent testimony before this Committee.

Mr. Chairman, no one could disagree with the concerns that underlie S. 605, H.R. 925, and other compensation bills. All citizens should be protected from unreasonable regulatory restrictions on their property. But these bills would do little or nothing to protect property owners or to ensure a fairer and more effective regulatory system. Rather, we are convinced that compensation bills are a direct threat to the vast majority of American citizens.

The truth is that these bills are based on a radical premise that has never been a part of our law or tradition: that a private property owner has the absolute right to the greatest possible profit from that property, regardless of the consequences of the proposed use on other individuals or the public generally. As a result, passage of these arbitrary and radical compensation schemes into law would force all of us to decide between two equally unacceptable alternatives. The first option would be to cut back on the protection of human health, public safety, the environment, civil rights, worker safety, and other values that give us the high quality of life Americans have come to expect. We would be forced to consider this option because the cost of these protections and programs after passage of this radical compensation legislation would be vastly increased. Ironically, if we choose this path, the value of the very property this legislation seeks to protect would erode as vital protections are diminished.

The other option would be to do what these proposals require: pay employers not to discriminate, pay corporations to ensure the safety of their workers, pay manufacturers not to dump their waste into the streams that run through our neighborhoods, pay restaurants and other public facilities to comply with the civil rights laws, and so on. In other words, American citizens would be forced to pay property owners to follow the law. In the process, we would virtually eliminate any hope of ever balancing the budget.

No matter which of these two avenues we pursue, hardworking American taxpayers will be the losers. Either they will no longer be able to enjoy the clean skies, fresh water, and safe workplaces they have come to expect, or they will be forced to watch as their tax dollars are paid out to corporations and other large property owners under programs that mandate compensation.

The Administration will not and cannot support legislation that will hurt homeowners or cost American taxpayers billions of dollars. The Administration, therefore, strongly opposes S. 605, H.R. 925, and similar bills. The Attorney General would strongly recommend that the President veto such legislation.

Although compensation bills vary in their particulars, I would like to make four general points today relevant to all these bills:

- (1) they are a radical departure from our constitutional traditions;
- (2) they are budget-busters that would result in untenable costs to American taxpayers;
- (3) they would create huge new bureaucracies and a litigation explosion; and
- (4) they would undermine our ability to provide vital protections to the American people.

II. A RADICAL DEPARTURE FROM THE CONSTITUTION

To understand the radical nature of these bills, it is necessary to understand the traditional constitutional protections afforded to property owners throughout our nation's history.

As you know, the Fifth Amendment to the Constitution of the United States provides that "private property [shall not] be taken for public use, without just compensation." That short phrase has provided the compensation standards for takings cases since the founding of our country. Within its contours lies a balance between the authority of the government to act in the public interest and its obligation to provide compensation when those actions place an unfair burden on an individual's property. Before we consider proposals to alter and expand those standards, it is worth discussing what the Constitution provides and why we believe it has served the American people so well over the last 200 years.

The genius of the Constitution's Just Compensation Clause is its flexibility. In deciding whether a regulation effects a compensable taking, our constitutional traditions require the government, and if necessary the courts, to consider the nature of the property interest at issue; the regulation's economic impact; its nature and purpose, including the public interest protected by the regulation; the property-owner's legitimate expectations; and any other relevant factors. The ultimate standards for compensation under the Constitution are fairness and justice. Thus, we have never recognized an absolute property right to maximize profits at the expense of the rights of others. For example, reasonable zoning by local governments has long been accepted as a legitimate means to promote safe and decent communities without requiring the payment of compensation to those whose property values might be adversely affected. Indeed, we recognize that the value of property in the community as a whole is thereby enhanced. On the other hand, when government regulation "goes too far" (in the words of Justice Holmes) and imposes a burden so unfair on an individual property owner that it constitutes a taking, just compensation must be paid.

It goes without saying that the economic impact of a regulation is an important consideration in deciding whether it would be fair and just to compensate a property owner. But in the very case that established the concept of a regulatory taking—*Pennsylvania Coal Co. v. Mahon* (1922)—the Supreme Court was careful to emphasize that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.

Thus, from the earliest days of our Republic, we have recognized that the government has a legitimate, and indeed a critical, role to play in protecting all of us from the improper exploitation of property. In America, we have an opportunity to use our property freely—within the bounds we set through our communities and elected representatives. We have also recognized that our rights as citizens entail a corresponding responsibility to refrain from exercising those rights in ways that harm

others. As noted by Justice Scalia in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899 (1992), the "understandings of our citizens" are such that "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." Much the same could be said of protective measures enacted by the federal government in the legitimate exercise of its constitutional powers.

This constitutional tradition has been carefully developed by the Founders and the courts through hundreds of cases over the course of our nation's history. As I mentioned, its genius is its flexibility, for it allows the courts to address the many different situations in which regulations might affect property. It allows for the fair and just balancing of the property owner's reasonable expectations and property rights with the public benefits of protective laws, including the benefit to the property owner.

The pending compensation bills disregard our constitutional tradition and our civic responsibilities. They replace the constitutional standards of fairness and justice with a rigid, "one-size-fits-all" approach that focuses on the extent to which regulations affect property value, without adequate regard to fairness, to the harm that a proposed land use would cause others, to the landowner's legitimate expectations, or to the public interest. H.R. 925 requires compensation where covered federal action reduces the value of any portion of property by 20 percent. S. 605 uses a 33 percent loss-in-value threshold.

It is important to recognize just how radical these bills are. In 1993, every Member of the U.S. Supreme Court joined an opinion stating that diminution in value by itself is insufficient to demonstrate a taking. See *Concrete Pike & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2291 (1993). They not only acknowledged the correctness of this principle, but they characterized it as "long established" in the case law. It is a principle developed and accepted by jurists and scholars throughout our nation's history. This constitutional principle does not result from insensitivity to property rights by the Founders or the courts, but instead from a recognition that other factors—such as the landowner's legitimate expectations, the landowner's benefit from government action, and the effect of the proposed land use on neighboring landowners and the public—must be considered in deciding whether compensation would be fair and just. Because compensation bills preclude consideration of these factors, their single-factor test would necessarily result in myriad unjustified windfalls at the taxpayers' expense.

The compensation bills are further flawed because the loss-in-value trigger focuses solely on the affected portion of the property. The courts have made clear that under the Constitution, fairness and justice require an examination of the regulation's impact on the parcel as a whole. *E.g.*, *Concrete Pipe*, 113 S. Ct. at 2290; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978). By establishing the affected portion of the property as the touchstone, these bills ignore several crucial factors essential to determining the overall fairness of the regulation, such as whether the regulation returns an overriding benefit to other portions of the same parcel.

Further, because these bills focus on the affected portion of the property, they are easy targets for manipulation and abuse. A landowner could segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (if not total) loss in value in almost every case. Suppose the civil rights laws require a restaurant to make its restrooms accessible to wheelchair users. Under bills like S. 605, the restaurant owner would not need to show the requisite loss in value for the entire restaurant, but only for the affected portion of the restaurant. In other words, the owner could argue that the space needed for this accommodation is no longer available for tables, and that because this small affected portion has been reduced in value, the owner could seek compensation. Proponents of these bills have acknowledged that the "affected portion" provisions would operate in this fashion, conceding, for example, that a restriction applying to only one acre of a 100-acre parcel could be compensable under these bills. See 141 Cong. Rec. H2509, col. 2 (March 2, 1995) (Rep. Canady).

Other provisions in these bills similarly go beyond constitutional standards for compensation. Although some provisions appear to be loosely based on certain Supreme Court cases interpreting the Just Compensation Clause, the bills distort these cases, by wrenching those standards from their appropriate setting and by disregarding important limitations.

For example, section 204(a)(2)(B) in S. 605 would require compensation where a condition of a permit or other agency action lacks "a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property." This standard appears to be derived from *Dolan v. City of Tigard*

(U.S. 1994) decided last Term. That case focuses, however, on situations where the government requires a permit applicant to make a dedication of property that eviscerates the applicant's right to exclude others. The *Dolan* Court expressly distinguished such dedication requirements, which involve the loss of fundamental property rights, from regulation that merely restricts the ability to use property in a particular way. The bill's revision of the *Dolan* test could inappropriately extend the "rough proportionality" standard far beyond public dedications of real property and apply it to any type of condition on agency action that might affect any type of property.

Even if a bill were to articulate accurately the holdings of Supreme Court cases under the Just Compensation Clause, any effort to freeze such holdings into law by statute would contravene the critical teaching of constitutional takings jurisprudence: that takings analysis best proceeds on a case-by-case basis through a balancing of all factors relevant to the ultimate constitutional standards of fairness and justice.

Surprisingly, proponents of pending compensation bills sometimes suggest that opposition to these bills is tantamount to opposition to the Just Compensation Clause of the Constitution. It should be clear by now, however, that these bills have nothing to do with the Just Compensation Clause. The Constitution nowhere provides that a property owner has an absolute right to use property without regard to the effect of the property use on others. Nor does the Constitution provide that reasonable efforts to protect the American people from harmful property use constitute a compensable taking.

None of the Founders ever proposed the radical and destructive "loss-in-value" compensation theory embodied in these bills, and no court has ever read the Constitution in this way. Nor has the Executive Branch. Nor have any of the previous 103 Congresses. This concept is simply nowhere to be found in our constitutional or political traditions. Yet the pending compensation bills would establish this extreme principle as the law of the land. It is simply false to state that these bills would vindicate constitutional principles, or that opposition to them constitutes opposition to the Constitution. To the contrary, this effort to supplant our constitutional tradition with extreme statutory compensation requirements reflects an unfortunate distrust of the genius of our Founders and the wisdom of the Constitution.

III. AN UNTENABLE FISCAL IMPACT

Because these bills are so broad and inflexible, and because they often mandate compensation where none is warranted, the potential budgetary impacts are extremely high, and for some bills virtually unlimited. Even if these bills forced a reduction in new regulatory protections, they would still have a huge fiscal impact by requiring compensation for statutorily compelled regulation and other essential protections.

As you may know, the Office of Management and Budget (OMB) has developed a preliminary estimate of the cost of the compensation title of H.R. 9. OMB estimates that direct spending for the compensation title of H.R. 9 would be \$28 billion through the year 2002. This direct spending estimate does not include the substantial discretionary costs of administering a compensation claims program, or the costs of managing the patchwork quilt of property parcels that the Federal government would be forced to acquire.

The compensation scheme in S. 605 is far broader in scope, and OMB therefore expects the cost of S. 605 to be several times the \$28 billion cost of the House-passed legislation. One proponent of S. 605 testified, with respect to the Americans With Disabilities Act alone, that potential liability would make administration of the Act prohibitively expensive. Because S. 605 goes beyond land-use restrictions and applies to all kinds of agency actions, it is likely to have many unintended consequences and untoward fiscal impacts that we cannot even begin to anticipate.

Some federal bills, such as S. 605, would also require the federal government to pay compensation for many State and local actions even where State and local officials would have the discretion to pursue another course of conduct. Imposing federal liability for actions by State and local officials would remove the financial incentive to ensure that State and local action minimizes impacts on private property and would thereby further expand potential federal expenditures. To avoid this liability, federal agencies would likely feel compelled to monitor State and local actions under federal programs more closely, or to withdraw delegated authority altogether, clearly a step-backward in the effort to devolve more authority to State and local governments.

Although the pending federal bills would not impose a direct compensation requirement on State and local governments themselves, certain cost information is

available from State and local governments that is illuminating by way of comparison. Associates recently conducted a case study of State compensation bills in New Hampshire. Using conservative assumptions, the researchers concluded that these bills would impose "unmanageable" costs, costs that for one town would exceed its annual budget. One could reasonably expect this experience to be replicated in affected federal programs if a comparable federal compensation bill were enacted.

Proponents of these bills sometimes argue that these costs are already being absorbed by the individual landowners. However, the potential costs of these bills are so high because the bills would require compensation in many cases where compensation would be unfair, unjust, and economically inefficient—for example, where the landowner had no reasonable expectation to use the land in the manner proposed, where land use regulation benefits the property as a whole, or where other uses would yield a reasonable return on investment without harming neighboring landowners or the public. In short, the bills would result in a tremendous and unwarranted transfer of public wealth to a small number of landowners.

These bills also would exact a tremendous economic toll by preventing the implementation of needed protections. For example, fish and shellfish populations that depend on wetlands support commercial fish harvests worth billions of dollars annually. If these radical compensation schemes render the protection of wetlands prohibitively expensive, the commercial fishing industry would suffer devastating financial losses. Note too that some of these bills might require compensation to the fishery and related economic interests whose profits are reduced by the failure to protect wetland habitats. There is seemingly no end to the chain of compensation claims created by these bills.

Some have suggested that the costs of a compensation bill might be limited by raising the loss-in-value compensation threshold. But because these bills apply the loss-in-value threshold to the *affected portion* of the property, it is unlikely that a higher threshold would result in a meaningful limitation on the scope and cost of the bills. A landowner could often segment the parcel or otherwise manipulate the loss-in-value calculation in a manner that demonstrates a very high (and thus compensable) loss in value.

Even if a compensation statute applied the loss-in-value threshold to the entire parcel, landowners would still be able to engage in strategic behavior to generate compensation claims, such as selling off unaffected portions to family members in order to demonstrate a high loss in the value of the remaining portion. These are far from hypothetical concerns, given the relative ease with which owners could identify and segregate ownership of those portions of their property subject to important protections. Although a court could consider the fairness of such activity in addressing a claim for compensation under the Constitution, the pending compensation bills might well preclude a court from taking these ploys into account.

Another reason why the costs of these bills would be so high is that they would remove any incentive on the part of developers and other property owners to devise plans that accommodate public values, or to reach a compromise on the appropriate balance between property use and the public good. Rather, these bills would encourage property owners to structure their land use proposals in a way that maximizes compensation under the bills, which would inevitably exacerbate controversies while driving up compensation costs.

Some proponents of these bills argue that the costs will depend on how regulators respond. But let us suppose that every regulator responds by doing everything possible to reduce impact on private property. The compensation costs for carrying out existing statutory mandates and providing needed protections would still be overwhelming. As we continue to explore ways to balance the federal budget, these bills are heading in exactly the wrong direction.

IV. HUGE NEW BUREAUCRACIES AND COUNTLESS LAWSUITS

Compensation bills would also require the creation of huge and costly bureaucracies to address compensation requests. Some bills would greatly expand the grounds for filing judicial claims for compensation where regulation affects private property. Others would establish extensive administrative compensation schemes with binding arbitration at the option of the property owner. Still others, like S. 605, would do both.

These bills would pose very sophisticated and complex legal questions that would create a business boom for lawyers and appraisers. Agencies would need to hire more employees to process compensation claims, more lawyers to handle claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under

these schemes would be overwhelming. The result would be far more government, not less.

We would be left with the worst of both worlds: a compensation test that ignores critical factors, but that contains terms and provisions that are vague and ambiguous in the extreme. Far from creating an easily administered "bright-line" for claimants, these bills would be a "lawyers' full employment act" that would ensure much more litigation, bureaucracy, and controversy.

V. A TREAT TO VITAL PROTECTIONS

Passage of a compensation bill would unquestionably undermine the programs and protections covered by the bill. This legislation thus poses a serious threat to human health, public safety, civil rights, worker safety, the environment, and other protections that allow Americans to enjoy the high standard of living we have come to expect and demand. If a compensation bill were to become law, these vital protections—which Congress itself has established—would simply become too costly to pursue. Compensation bills that apply to specific environmental protections for wetlands, endangered species, and the like are in their practical effect a frontal assault on these basic protections. Compensation bills that apply to federal programs across the board are, in our view, an attack on our ability to provide basic protections for the American people.

Although these bills purport to protect property rights, they would undermine the protection of the vast majority of property owners: middle-class American homeowners. For most Americans, property ownership means home ownership. "Property rights" means the peaceful enjoyment of their own backyards, knowing that their land, air, and drinking water are safe and clean. The value of a home depends in large measure on the health of the surrounding community, which in turn depends directly on laws that protect our land, air, drinking water, and other benefits essential to our quality of life.

In fact, in a survey by a financial magazine, clean water and air ranked second and third in importance out of 43 factors people rely on in choosing a place to live—ahead of schools, low taxes, and health care. By undercutting environmental and other protections, these automatic compensation bills would threaten this basic right and the desires of middle-class homeowners. In the process, the value of the most important property held by the majority of middle-income Americans—their homes—would inevitably erode.

Much of the debate about these issues has been fueled by what appear to be horror stories of good, hardworking Americans finding themselves in some sort of regulatory nightmare where the government is forbidding them from using their property in the way that they want. It is important to look closely at these stories, for they often are not as they first appear. They sometimes contain a kernel of truth, but you should realize that you're not always getting all of the facts.

I am not suggesting that there are no genuine instances of overregulation. We all know of cases of regulatory insensitivity and abuse that are quite simply indefensible. As I will discuss later, this Administration has made strides in protecting middle-class landowners and others from unreasonable and unfair burdens, and we are committed to continuing the effort to reinvent government until the job is done.

Before I address those efforts, however, I want to draw the attention of the distinguished Members to another set of horror stories: those that may result if these compensation bills become law. I am confident that these are not the consequences any of us want:

- Suppose a coal company in West Virginia removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. If the State refused to take action, and the Interior Department required the mining company to reduce the amount of coal it was mining to protect property and public safety, the mining company might well be entitled to compensation for business losses under a compensation bill.
- Suppose flight patterns at a military-airfield require flights over urban areas. Existing case law under the Constitution might require compensation for overflights only where there are regular and frequent overflights at altitudes of 500 feet or less above ground level. Flight patterns at many military airfields, especially those near cities, have been designed with the well-established 500-foot standard in mind to ensure that operations occur in freely navigable airspace. Compensation bills would supplant established standards and subject the Defense Department to compensation claims irrespective of the altitude of the overflight.

- Suppose the federal government restricts the importation of assault rifles. If an import permittee could show that the ban reduced the value of his overseas inventory, he could seek compensation under these bills.
- Suppose a group of landowners challenge the implementation of the National Flood Insurance Program, which includes eligibility criteria that restrict land use to decrease the risk of flooding. The landowners could argue that such restrictions diminish the value of their land and claim compensation.
- Suppose the Army Corps of Engineers denies a developer a fill permit under section 404 of the Clean Water Act because such development by the applicant and other nearby landowners would increase the risk of flooding of neighboring homes. Unless the Corps could bear the difficult burden of showing that the permit denial comes within the nuisance exception or some other exception contemplated by these bills, compensation could be required. On the other hand, if the permit were granted, neighboring landowners might claim compensation by arguing that the increased flood risk devalued their land.
- Suppose the Coast Guard establishes a phase-out schedule of single hull tankers; or suppose the Federal Aviation Administration orders airlines to suspend use of certain commercial aircraft that raise serious safety concerns; or suppose the Federal Highway Administration issues out-of-service orders to motor carriers directing them to cease using vehicles that pose an imminent hazard to safety. These bills raise the possibility that the taxpayers would have to compensate affected corporations for lost profits or other economic losses where they have been directed to cease operating unsafe equipment to protect the public.

These are just a few examples of the problems with the "one-size-fits-all" approach of these compensation proposals. It is worth noting that most of these examples reflect actual situations in which property owners challenged government conduct as constituting a compensable taking under the Constitution. In each case, the court, often after noting the public benefit derived from the protection at issue, concluded that there had been no taking of property. If a compensation bill becomes law, a different outcome in those cases may well be the result.

VI. THE INADEQUACY OF THE NUISANCE EXCEPTION AND OTHER EXCEPTIONS TO THE COMPENSATION REQUIREMENT

Both S. 605 and H.R. 925 purport to address health and safety concerns by providing an exception to the compensation requirement where the property use at issue would constitute a nuisance under applicable State law. It is entirely inaccurate to suggest, however, that this exception would allow for adequate protection of human health, public safety, the environment, and other vital protections important to the American people.

It goes without saying that where State law sufficiently addresses an issue, Congress has no reason to address the issue through federal legislation. Congress generally provides for federal protection of human health, public safety, the environment, and other important interests only where State law is inadequate to the task. State nuisance law was never intended, and has never served, as comprehensive protection from human health risks and other threats to our welfare.

The legislative histories of the major environmental statutes demonstrate the inability of State nuisance law to provide comprehensive protection. For example, the legislative history of the Clean Air Act contains a report by the Secretary of Health, Education and Welfare regarding the problems of air pollution from stationary sources. The report discusses a rendering plant in Bishop, Maryland, and describes how emissions from the plant endangered the health and welfare of the residents of Shelbyville and adjacent areas. Adverse health effects included "nausea, vomiting, lack of appetite; gasping, labored breathing, irritation of nose and throat, aggravation of respiratory ailments; emotional or nervous upsets ranging from anger to mental depression; and headaches, general discomfort, or interference with the ability to work or to enjoy homes and property." Other adverse effects included "discouraged industrial and business development, depressed property values, diminished real estate sales, [and] decreased business volume * * *." The report concluded that State nuisance law was inadequate to address these severe health and welfare dangers:

Bishop Processing Company's dry rendering plant has had problems with malodors since it became operational in 1955. Officials from Delaware and Maryland recommended corrections but all efforts to obtain abatement by local and State officials through public nuisance laws have been fruitless.

There are several factors that might, in given circumstances, render nuisance law inadequate to provide comprehensive protection from widespread pollution, including the difficulty of proving a causal link between the harm and the unreasonable conduct of the defendant, and the difficulty in establishing a nuisance where serious cumulative harm is caused by pollutants from several sources, none of which by itself would cause significant damage. Moreover, the landowner's conduct might have to be substantial and continuing in order to come within the nuisance exception, which would render the exception inapplicable to single or intermittent discharges of toxic pollutants. Nor would the bills' nuisance exception cover many protections designed to address long-term health and safety risks.

Due to the limitations inherent in State nuisance law, property owners and others have failed to obtain relief in nuisance actions for a variety of harms and injuries, including flooding caused by filling of adjacent property, *Johnson v. Whitten*, 384 A.2d 698, 701-702 (Me. 1978), groundwater contamination, *Cereghino v. Boeing Co.*, 826 F. Supp. 1243, 1247 (D. Or. 1993), hazardous waste contamination of property, *American Glue & Resin, Inc. v. Air Products & Chemicals, Inc.*, 835 F. Supp. 36, 48-49 (D. Mass. 1993), and contamination of a creek by a leaking landfill, *O'Leary v. Moyer's Landfill, Inc.*, 523 F. Supp. 642, 657-58 (E.D. Penn. 1981). Although some of these examples might constitute a nuisance in other jurisdictions or in different factual settings, these cases amply demonstrate that State nuisance law does not provide comprehensive protection to all Americans from threats to human health, public safety, the environment, our homes, and our property. A nuisance exception to a debilitating compensation requirement would undermine our commitment to nationwide minimum standards of protection.

The nuisance exception also fails to recognize that there are other important public interests unrelated to health and safety and not addressed by State nuisance law, such as national defense, foreign relations, civil rights protection, worker safety rules, airline safety, food and drug safety, and many other vital protections. By requiring compensation for many protections that Congress has deemed necessary to advance the public interest, except where such protections fall within State nuisance law, many compensation bills would undermine Congress's authority to decide what conduct or activity needs to be regulated to protect the public.

H.R. 925 contains an additional public safety exception to the compensation requirement where agency action has "the primary purpose" of preventing an "identifiable" hazard to public health or safety or damage to "specific property." These provisions are extremely vague. It is not at all clear whether they would allow for adequate protection of the public against cumulative threats or long-term health and safety risks, and they would appear to require the American people to bear the risk of scientific uncertainty. This provision would not only spawn countless lawsuits over the meaning of its amorphous terms, but also preclude basic protections for the American people where an agency is unable to demonstrate that its action falls within the provision's narrow scope. This provision points up the danger of replacing the proven, time-honored constitutional standards for compensation—which allow for full consideration of all relevant factors on a case-by-case basis—with an inflexible statutory formula that holds vital protections hostage to an ambiguous and prohibitively expensive compensation requirement.

VII. OTHER CONCERNS

The overall breadth of the compensation bills is staggering. In S. 605, the definitions of "agency action," "property," "taking," and other key terms are so open-ended that they impose no meaningful limitation on the reach of the bill. For example, "agency action" is not limited to regulations, permit denials, and the like, but seems defined in a circular fashion to include everything an agency does that "takes" property as that term is used in the bill. The term "taking of private property" is similarly defined in a circular fashion to include anything that requires compensation under the bill. These open-ended definitions are combined with the exceedingly broad compensation standards discussed above.

Think of the consequences of these bills for just the federal permit programs. A landowner would be able to claim compensation whenever an application for a federal permit is denied. For example, a landowner could apply for a federal permit to build a waste incinerator. If that permit is denied for whatever reason and the denial decreases the value of the property, the government could be obligated to pay the permit applicant. It is not much of a stretch to conclude that applying for federal permits may become a favored form of low-risk land speculation. The more likely a permit is to be denied, the more attractive it may be under these schemes.

S. 605's confusing terms and conditions make it difficult to predict how the courts would apply it, but we can rest assured that plaintiffs' lawyers will seek the broad-

est possible application: compensation where military training temporarily disrupts neighboring property owners; compensation for a bank where federal regulators determine that the bank is no longer solvent and appoints a receiver; compensation for corporations based on changes designed to stabilize and protect pension plans; compensation for agricultural interests that must comply with restrictions which are imposed to control the spread of animal and plant pests and diseases; compensation based on restrictions on the sale of explosives; compensation to manufacturers subject to prohibitions on the sale of dangerous medical devices; compensation for farmers subject to acreage allotments and marketing quotas for tobacco crops; and so forth.

Although more limited than S. 605, H.R. 925 is also broadly worded and would likely have many unintended consequences. In addition to countless claims arising out of protections for wetlands and endangered species, potential claims will likely result from annual water allocation decisions, water contract renewals, water contract enforcement actions, denial of change-of-use or water transfer requests, and flood control activities. For example, claims could arise where the Forest Service places restrictions on the renewal of special-use authorizations for water diversions to enhance stream inflows to meet the requirements of Forest Plans. Claims might also be asserted based on decisions affecting rights of way and easements across federal land that affect water delivery. The examples are virtually endless.

VIII. OPPOSITION TO COMPENSATION BILLS

It is because of these far-reaching consequences that the Administration is in good company in opposing these bills. The National Conference of State Legislatures, the Western State Land Commissioners Association, and the National League of Cities have opposed compensation bills of this kind. Religious groups, consumer groups, civil rights groups, labor groups, hunting and fishing organizations, local planning groups, environmental organizations, and others are on record as opposing compensation legislation. More than 30 State Attorneys General have written the Congress to oppose takings legislation that goes beyond what the Constitution requires.

In a referendum vote last November, the citizens of Arizona voted down by a 60 to 40 margin a process-oriented takings bill subject to many of the same criticisms as the compensation bills before the Congress. States are concerned that compensation bills would cost taxpayers dearly and eviscerate local zoning ordinances, and that family neighborhoods would be invaded by pornography shops, smoke-stack industries, feedlots, and other commercial enterprises. The Administration shares these States' concerns that compensation schemes would bust the budget, create unjust windfalls, and curtail vital protections. And, as I noted earlier, certain federal compensation bills would apply directly to various State and local actions.

Moreover, any federal compensation bill would be served up as a model for compensation requirements at other levels of government. Many of the groups that are lobbying for a federal compensation bill are pushing for comparable State and local legislation as well. If enacted at the local level, compensation bills could render local zoning and everyday local land-use planning obsolete. Citizens would lose the ability to control the growth and development of their neighborhoods and communities.

IX. A BETTER APPROACH TO PROTECTING PROPERTY RIGHTS

The broad-based compensation packages currently pending in Congress are not the answer to the horror stories that I know all of you have heard and may well hear from other panelists today. Rather, we believe the answer lies in crafting specific solutions to specific problems.

As we consider the potential effects of compensation bills, it is important to keep the takings issue in perspective. Certain advocates of compensation bills suggest that the government routinely disregards constitutional protections for private property. This is simply incorrect. To cite but one example, of the 48,000 landowners who applied for a permit under section 404 of the Clean Water Act in 1994, only 358, or 0.7 percent, were denied a permit. Another 50,000 land-use activities are authorized annually through general permits under the 404 program. And we now have only about 40 takings claims involving the 404 permit program.

As part of our efforts to reinvent government, the Administration is continuing to look for ways to reform specific federal programs to reduce burdens on small landowners and others. Other Administration witnesses will describe these reforms more fully, but let me mention just a few.

Under the wetlands protection program, many individuals and small businesses are already allowed to fill portions of certain wetlands without needing to get an individual permit. Three new initiatives will give small landowners even greater flexibility. First, landowners will be allowed to affect up to one half acre of wetlands

to construct a single-family home and attendant features such, as a garage or driveway. The second initiative clarifies the flexibility available to persons seeking to construct or expand homes, farm buildings, and small business facilities where the impacts are up to two acres. Third, the Administration proposed new guidance that will expedite the process used to approve wetland mitigation banking, which will allow more development projects to go forward more quickly. In addition, the Army Corps of Engineers is reforming its wetlands program to make the permit application process more efficient. These reforms will substantially reduce or eliminate the burden for small landowners in many cases.

At the Interior Department, Secretary Babbitt is pursuing several changes to the endangered species program to benefit landowners. For the first time ever, the Interior Department has proposed significant exemptions for small landowners. Under this new policy, activities that affect five acres or less and activities on land occupied by a single household and being used for residential purposes would be presumed to have only a negligible adverse effect on threatened species. The same would be true for one-time activities that affect five acres or less of contiguous property if the property was acquired prior to listing. Thus, under most circumstances, these tracts would be exempted from regulation under the Endangered Species Act (ESA) for threatened species. The Interior Department has also announced an increased role for the States in ESA implementation, and new proposals to strengthen the use of sound and objective science. Under a new "No Surprises" policy, property owners who agree to help protect endangered species on their property are assured their obligations will not change even if the needs of the species change over time. The Interior Department's "Safe Harbor" policy also protects landowners from additional ESA land use restrictions where they voluntarily enhance wildlife habitat on their lands. And under a comprehensive plan for the protection of the Northern Spotted Owl, the Fish and Wildlife Service proposed a regulation that would generally exempt landowners in Washington and California owning less than 80 acres of forest land from certain regulations under the ESA designed to protect the Owl.

Proponents of statutory compensation schemes have argued that they are necessary because it is difficult and time-consuming to litigate a constitutional takings claim in federal court. You will hear them say it takes fifteen years and \$500,000 to litigate these claims. On balance, however, the cases they cite to support this assertion generally involve multimillion dollar claims brought by large corporations. Although lengthy litigation is to be avoided where possible, complex-business litigation is often hard fought and protracted.

We are keenly aware of the need to assure that all Americans can seek redress through the courts for meritorious claims. A property owner who successfully litigates a takings claim is currently entitled to recover attorneys fees, litigation costs, and interest from the date of the taking, a powerful aid to vindicating meritorious claims. The Justice Department is committed to working with the courts to devise additional ways to ensure that takings claims may be resolved quickly and efficiently, including the use of alternative dispute resolution techniques where appropriate. Again, we believe that solutions that focus on the specific issues of concern are preferable to rigid, one-size-fits-all compensation schemes.

X. RADICAL CHANGES TO THE COURT OF FEDERAL CLAIMS

Certain takings bills would expand the jurisdiction of the U.S. Court of Federal Claims (CFC) by giving it the authority to invalidate acts of Congress that adversely affect private property rights, and to review agency action even where other statutes confer jurisdiction elsewhere.

We are greatly troubled by these provisions, which discard the important distinctions between the CFC, an Article I court created by statute, and the district courts, Article III courts whose judges are life-tenured. We believe this radical expansion of the CFC's authority raises serious constitutional concerns.

Briefly put, these provisions plainly implicate Article III of the Constitution, which provides that "[t]he judicial Power of the United States, shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish." These provisions would grant the CFC the power to invalidate acts of Congress that adversely affect property rights in violation of the Constitution. The CFC would be authorized to strike statutes from the books at the request of private parties, thereby affecting the rights of third parties protected by the statutes but not before the court. We believe that grant of power probably violates Article III.

The expansion of the CFC's injunctive and declaratory powers also raises separation of powers concerns. Under these proposals, the CFC could hear constitutional challenges to any statute or regulation, enacted under any of Congress's powers, in-

volving any department or agency of the federal government, as long as the challenge involves the claim that the government action adversely affects private property. That would give the court government-wide as well as nation-wide jurisdiction over an important class of constitutional cases. By adding to the CFC's existing power to award damages the power to issue injunctions and declaratory relief, the CFC would become indistinguishable from an Article III court in its remedial powers.

We are also opposed to the repeal of 28 U.S.C. § 1500, which bars the CFC from hearing any claim as to which the plaintiff already has a claim pending in another court. First, there is no need to repeal that section. Advocates of repeal argue that repeal is necessary because current law forces a property owner to elect between equitable relief in federal district court and monetary relief in the CFC. That view of the law is, however, outdated and mistaken. *Loveladies Harbor v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (the CFC may entertain a claim for monetary relief where the plaintiff has another claim for equitable relief arising out of the same facts pending in federal district court).

Second, the repeal of § 1500 would create opportunities for savvy litigators to manipulate the courts in bringing not just takings claims but all claims over which the CFC has jurisdiction. For example, if § 1500 were repealed, a plaintiff would be able to begin litigating aspects of a contract claim in district court and subsequently initiate a suit before the Court of Federal Claims in an effort to find the most sympathetic forum and to stretch the Department's litigation resources. While the United States presumably would have the right to transfer the cases and consolidate them in one forum, the United States might not learn until well into the litigation that a complaint filed in the district court involved the same dispute as a complaint filed in the CFC due to the minimal requirements of notice pleading. Our ability to identify related actions would be further limited by the sheer volume of civil litigation involving the United States.

XI. CONCLUSION

The Administration strongly supports private property rights. Compensation bills, however, represent a radical departure from our constitutional traditions and our civic responsibilities. They would impose an enormous fiscal burden on the American taxpayer, generate unjust windfalls for large landowners, create huge and unnecessary bureaucracies and countless lawsuits, and undermine the protection of human health, public safety, the environment, worker safety, civil rights, and other vital interests important to the American people. As a result, they would hurt the overwhelming majority of American property owners, middle-class homeowners, by eroding the value of their homes and land.

The Administration would like to work with the Congress to find ways to further reduce the burden of regulatory programs on American property owners. Compensation bills, however, are a ham-fisted, scattershot approach that would impair our ability to carry out essential functions and would impose a tremendous and unwarranted cost on the pocketbooks of middle-class Americans. Accordingly, the Attorney General would strongly recommend that the President veto compensation legislation.

PREPARED STATEMENT OF REV. ROBERT A. SIRICO, CSP, THE ACTON INSTITUTE FOR THE STUDY OF RELIGION AND LIBERTY

As Congress debates issues of private property rights, legislators have heard from many in the clergy who expressed moral concerns about the nature of private property, and provided valid insights on the social teaching of the Church. One can only welcome varied points of view on this subject. Yet one matter must be clarified. It should not be implied that the Catholic tradition stands at odds with an enforcement of private property. Indeed, the practice of clerics exhorting people on issues of property has a long tradition. Property has long been seen as one of many material expressions of the dignity of the human person and the means by which our individuality can become a part of a community of enterprise through material trade and exchange. Property rights are a means by which society can guard human rights more broadly, and, thus, deserve protection and respect by both public and private institutions.

Consider the message of St. Bernardino of Sienna, a fifteenth century priest, scholar, and missionary who traveled the whole of Italy on foot, delivering three to four lengthy sermons daily to the hundreds of people who would gather to hear

him.¹ As a good priest, his primary concern was the salvation of souls. He also had a passionate commitment to healing feuds between people, thus bringing about social peace, and righting the wrongs of public officials, in particular with regard to their unjust takings of private wealth.

This is why St. Bernardino is also sometimes jokingly called the patron saint of economists. As a student of the work of St. Thomas Aquinas, St. Bernardino's writing contains much theorizing on economic theory. His published works reveal that he was a committed advocate of private property, the rights of workers and employers to freely contract, the free adjustment of wages and prices, and non-inflationary money.²

Part of St. Bernardino's civic mission was to end the practice of public and private theft. The mini-states of Italy were frequently headed by governments that would tax beyond what was necessary. They harmed the economic well being of the people who were struggling to make a living in very difficult times. Corruption in government feeds corruption among the people, just as the Scholastics taught, so it was not surprising that theft was also rampant. Frequently, after St. Bernardino visited a town and exhorted the people on the evils of theft and the sanctity of private property, tax collectors and criminal bands were convicted of their sins and returned their ill-gotten goods to the proper owners.³

I present to you one of his sermons, and you will see why he had such an effect on people. "One day, as St. Francis was traveling through a city," St. Bernardino said, "a demon-possessed person appeared in front of him and asked: 'What is the worst sin in the world?' St. Francis answered that homicide was the worst. But the demon replied that there was one sin still worse than homicide. St. Francis then commanded: 'By God's virtue, tell me which sin is worse than homicide!' And the devil answered that having goods that belong to someone else is a sin worse than homicide because it is this sin which sends more people to Hell than any other".⁴

I am not speculating on the eternal destination of the framers and interpreters of the Endangered Species Act, wetlands regulations, and other regulatory excesses. But I do want to drive home the point that the protection of private property is central to Catholic social teaching. St. Bernardino's strong views on the sanctity of private property were not, and are not, outside the mainstream of Catholic tradition. As Pope John II says in *Centesimus Annus*, private property derives from both eternal and natural law⁵, and we know this in part because God's law commands us not to steal, a rule which reinforces the moral obligation to respect the boundaries of ownership. It is these boundaries which are the foundation of economic exchange, the efficient use of resources, charity, social stability, financial security, and public and private virtue.⁶

Today, Congress is considering how to better secure the private property of American individuals, businesses, and families against public and private takings and regulatory invasions. I will state my position without ambiguity: we need more security in the property that Americans hold, more well-defined identification of what constitutes property, more rigorous enforcement of the takings clause in the 5th amendment of the U.S. Constitution, and stricter standards for what constitutes a taking of private property.

I say this not because I am a legal theorist, but because I believe, with St. Bernardino, that the protection of private property would be best for the common good and public morality. Private property is the foundation of the ethics of civic life. If we accept the commandment against stealing, it is because we understand that issues of justice are closely bound up with the private ownership of resources.

¹ Biographic information on Bernardino is from Thurston, Herbert J., and Donald Attwater, eds. "St. Bernardino of Siena," in *Butler's Lives of Saints* (Westminster, Maryland: Christian Classics, 1987), vol II, p. 354-56.

² Chafuen, Alejandro. *Christians for Freedom: Late Scholastic Economics* (San Francisco: Ignatius Press, 1986). The preacher was even known to have given useful entrepreneurial advice. A humble playing card maker in Bologna once complained that St. Bernardino's sermons had caused a huge economic downturn in the gambling industry. Selling cards was the card maker's only means of support, and now he was going broke. St. Bernardino had a suggestion for this man. Why not use his skill to make cards with religious symbols on them? Instead of gambling, people could use them as constant reminders of God, faith, and their moral obligations to each other. The card maker did as the saint suggested, and the result was a happy one: there was greater public demand for religious cards than there ever was for playing cards, and far more money to be made in the practice of marketing virtue than in pandering to vice. See *Butler's Lives of Saints* (Westminster, Maryland: Christian Classics, 1987), vol II, p.354-56.

³ Thurston, et al. *Butler's Lives of Saints* (Westminster, Maryland: Christian Classics, 1987), vol II, p. 354-56.

⁴ Quoted in Chafuen, pp. 43.

⁵ *Centesimus Annus* (D.C.: U.S. Conference of Catholic Bishops, 1991), secs. 30, 31.

⁶ Mises, Ludwig von. *Socialism* (Indianapolis: LibertyFund, 1981), pp. 27-44.

When private property is routinely violated by either public or private parties, the social peace is profoundly disturbed. People are prevented from having security in the knowledge of what is justly theirs and what belongs to the community. That in turn harms the ability of property and property owners to accumulate value, for it to be traded and exchanged, and for people to plan a decent future for their families.

Many theorists of a modern liberal political bent draw a strict line between private and public ethics. They say while it is certainly wrong for common criminals to come on to your land, steal your livestock, and burn your crops, it is perfectly fine for government to take the value of property and impose value-destroying regulations in the name of the greater good of society. Political scientists can argue this point all day, but from the individual's point of view, there is no difference between a private taking and an uncompensated public taking. Both harm the owner and inspire the passionate demand that it be stopped.

Who can doubt that Americans no longer feel as secure in the knowledge that they keep and use what they earn and own? Vague regulations, many times arbitrarily and capriciously enforced, have led thousands to be robbed of the livelihood under the alleged goal of helping the common good. The proliferation of uncompensated public takings is the key to understanding the headlines about the anti-government revolt, not just in the West, but in every region that has been affected by the overregulation of economic life. Government policy has made property less secure in the hands of private owners than it ought to be.

Because the phrase "the common good" is a key part of Catholic social teaching, I would like to discuss what it means in the context of private property. There are those who would set up a strict wall of separation between private property and the common good. What helps property hurts society; thus if you want to help society, hurt property. That is roughly the formula used by advocates of the so-called social gospel from the Progressive Era to the present.

But there is a much older tradition which views private property as the very foundation of the common good. Aristotle said that private property is essential for liberality and charity. You cannot give away what you do not own. He also said "when everyone has his own separate sphere of interest, there will not be the same ground for quarrels; and the amount of interest will increase, because each man will feel he is applying himself to is his own."⁷

G.K. Chesterton made the same point in explaining why he is not a socialist. He said that while a society without private property might work in practice, it was a terrifying ideal. Among other institutions that would vanish, there would no longer be such a thing as a gift. St. Thomas Aquinas, the whole Scholastic tradition, and Luther and Calvin were passionate advocates of private property—on grounds that property keeps peace between people. The Catholic tradition has solidly endorsed private property, as have orthodox Protestant opponents of socialism.

In the secular, classical liberal tradition, we find that John Locke's idea of private property is essentially the same as the Scholastic one: individuals own what they mix their labor with and acquire as a result of their own efforts. Following in that tradition, the framers of the constitution clearly believed in the enforcement of property, or else they would not have placed such a clear restriction on the ability of the federal government to take it without providing just compensation.

Pope Leo XIII, in *Rerum Novarum*, reiterates the Scholastic view. "Moreover, since man expends his mental energy and his bodily strength in procuring the goods of nature, by this very act he appropriates that part of physical nature to himself which he has cultivated"⁸.

Now, in all these traditions, private property was seen as having a social benefit because it allowed for the advancement of overall prosperity. Apart from property, there can be no full expression of contract. Apart from contract, there can be no voluntary exchange. Apart from voluntary exchange, there can be no enterprise or increases of wealth that come from exchange. Property is the foundation of entrepreneurship, familial security, and charity to care for the least well off among us.

Drawing upon this tradition, the pope in *Centesimus Annus* notes that the right to private property should be affirmed with great clarity, while also affirming that the use of goods, while marked by freedom, is subordinated to their common destination as created goods.⁹ Property always serves both the owner and the common good. Property has both a particular and a universal destination. Yet I draw your

⁷ Quoted in Jeremy Waldron *The Right to Private Property* (Oxford): Clarendon Press, 1988), p. 6, and generally on the Western tradition of property-rights justification. However, this author does not endorse all of Professor Waldron's conclusions.

⁸ *Rerum Novarum*, sec. 15.

⁹ *Centesimus Annus*, secs. 30, 31.

attention to the phrase "while marked by freedom." Private property is best utilized when done so freely, for the concerns of particular needs and uses.

The "universal destination of goods," of which Pope John Paul II speaks, does not imply that resources must be socialized through government intervention¹⁰. As the Church has always taught, private property has a universal destination in the sense that its benefits are conveyed even to those who are not property owners. The universal destination of private property is best insured by the immediate owner of the property. This fact would be affirmed by the principle of subsidiarity. Those closest to the goods and communities in which these goods exist, are best able to discern how to most effectively utilize them.

We must therefore think seriously before we override people's right to freely dispose of their property as they see fit. The pope goes on to remind us that "the free market is the most efficient instrument for utilizing resources and effectively responding to human needs."¹¹

Throughout *Centesimus Annus* is the theme that the most humane economic system is one which blends private property, human freedom, and the benefits of free markets with an eye toward the common good. While the right to private property is not absolute, it is still sacred and should be limited first through the responsible efforts of owners, not the distant planning of politicians and bureaucrats.¹²

There are two primary dimensions to property. One is ownership. Ownership is the claim that we put on what is ours and the key to recognizing what is not. Ownership defines and clarifies so that our material needs can be met through voluntary exchange. The second aspect is control. From Augustine to Epstein, legal theorists have always understood that control of property is as crucial as ownership itself. One of the unfortunate developments of American law in this century has been the growth of regulations that diminish the right of control even while they recognize the right of ownership. The separation between the two is the key to understanding the growth of the regulatory state.

Yet it was only in very recent times that this attack on the control of property has been extended to the actual dispossession of private-property ownership itself. Instead of merely telling property holders what they can and cannot do with what they have, the government now tells them what they can and cannot regard as their own in the first place, which effectively takes away ownership in every way but by formal declaration. Horror stories about such cases abound.

The giant empirical experiment called socialism taught us nothing if not that collective ownership and the common good are not the same thing. Any law which is based on taking another person's property without just criteria, and which provides no compensation, is going to create social friction and division. It is in part because this practice has grown more and more routine in the administration of federal law that we see a political rebellion growing in all regions of the country.

It is natural for people to resist thieves, even when the thieves cloak their actions in the name of the environment, the common good, or the welfare of all. Every taking of property constitutes a use of force against what a person regards as privately owned. If we want to minimize the use of force in society, especially that undertaken for narrow political concerns, then property ought to be taken only under very special circumstances, and then only when this taking is properly compensated and demonstrably represents an increase in well being of society at large.

No area of rights can be handled in a doctrinaire or absolutist fashion. The fundamental concerns of life, speech, assembly, and property can neither tolerate absolutes nor afford to be decided on a majoritarian basis. Absolutes in human dealings are attractive yet often unrealistic. They assume a simpler world than experience shows. This does not mean that there are no absolutes. Absolute values are important. The sacredness of life, the importance of truth, justice and goodness, are absolute values. While admitting to the non-absoluteness of property rights do we not permit unnecessary and imprudent violations of such rights. Before we take any action against private property, a right so central to the entire American founding, experiment, and dream, we must ask ourselves what precedent we are setting for possibly further abuse of such fundamental underpinnings of our social order.

There is not one definitive Catholic teaching on the political answer to the moral question of public takings of private property. As Pope John XXIII affirmed in *Mater et Magistra* "When it comes to reducing these teachings to action, it sometimes happens that even sincere Catholics have differing views. When this occurs they should

¹⁰ See *Rerum Novarum*, sec 55.

¹¹ *Centesimus Annus*, sec 42.

¹² *Rerum Novarum*, sec. 14; *Centesimus Annus*, sec. 48.

take care to have and to show mutual esteem and regard, and to explore the extent to which they can work in cooperation among themselves."¹³

I would not presume to have the energy or the ability of persuasion that St. Bernardino had—and if I did the audience for these notes would have to be captive for upwards of four hours—but my message to Congress is the same one he gave to governments that have overextended their reach. Establish a legal means of returning ill-gotten gains and commit yourselves more fully to the commandment against taking what is owned by others. If you give greater protection to private property, special interest groups will undoubtedly complain. Yet like the property owners they seek to pilfer, perhaps these groups should use their considerable talents to take a living through the trade and exchange of justly-owned, private resources.

PREPARED STATEMENT OF AMERICAN HOMEOWNERS FOUNDATION

The American Homeowners Foundation commends the Senate Judiciary Committee for addressing the challenging issue of property rights. The encroachment of otherwise desirable environmental laws and regulations on the constitutionality guaranteed right to private property has occurred gradually over many years. It has now reached the point where the conflict must be resolved by either amending the Constitution so as to reduce the level of property rights it originally guaranteed, modifying existing environmental laws and regulations so as to eliminate the conflict of providing an equitable mechanism similar to eminent domain procedures so as to simultaneously protect the environment and private property rights.

Public opinion surveys indicate an overwhelming preference for the latter approach. A May 1995 Roper Starch poll indicated that $\frac{2}{3}$ of Americans believe landowners should be compensated for environmental takings. An April Washington State Elway poll revealed that 88 percent of those surveyed believe that owners should be compensated for the value of the land when environmental regulations preclude development. We understand that another state poll showed similar results.

What those numbers show is that an overwhelming majority of Americans owe a great amount of gratitude and appreciation to the sponsors and supporters of S. 605 and the members of the Senate Judiciary Committee. All of us, including especially the nation's 65 million homeowners, thank you for advancing legislation that provides reasonable compensation for economic losses incurred when legitimate environmental priorities make it appropriate to preclude property development.

Another advantage of the measure is that it will lead to the federal acquisition and permanent protection of environmentally sensitive habitats. All budgets have some fluff in them and the bill will give agencies an incentive to reallocate resources from fluff to more important substantial permanent acquisitions that will benefit generations to come. It will create an opportunity for environmental groups and homeowners to regain a common ground and work together in support of environmental goals and budgets for the creation and expansion of parks, and forests.

The approach of S. 605 is consistent with a concept advanced by the "Green Scissors" coalition of fiscally conservative public interest groups and environmental organizations. They are calling for an end to \$33 billion in environmentally sensitive federal subsidies, with the resulting savings to be applied to reducing the deficit. Led by Friends of the Earth and the National Taxpayers Union Foundation, their concept combines budget reduction and environmental protection. Both are supported by most homeowners. We urge the Senate to support the concept with the additional modification that half of the estimated total savings—\$16.5 billion—should be earmarked for the federal acquisition of land and/or development rights to environmentally sensitive land. This money would cover the costs of land that might be acquired after the enactment of S. 605. Even if the budget savings were half of the Coalition's projections it could contribute further to the protection of tens of thousands of acres of sensitive land.

The first step of course is the passage of S. 605. The vast majority of the nation's 65 million homeowners support private property compensation. The bill will provide for that compensation. It will provide a platform which could reunite homeowners with environmentalists in a common goal rather than continuing the disagreement over whether an unlucky individual homeowners or society at large should absorb the costs of environmental protection. Most of the 12 million members of environmental organizations are homeowners anyway. Many homeowners who dropped their memberships because of this issue will see a new way to work together.

¹³ *Mater et Magistra*, sec. 238.

For those reasons we support S. 605 and urge its speedy enactment.

BOTH WASHINGTON PROPERTY RIGHTS INITIATIVES HAILED

Washington D.C., October 16, 1995. The nation's educational and research organization serving homeowners hailed initiatives on both coasts which will return to homeowners property rights which have been seriously eroded over the last decade. In Washington D.C. both Senate Majority leader Bob Dole and Judiciary Committee Chairman Orrin Hatch indicated on October 5 that passage of federal property rights legislation is a "highly priority". In an exchange of letters Senator Hatch assured Senator Dole that he will try to have the bill out of committee by Thanksgiving and ready for floor action in January. The Senate measure, S. 605, is the companion for a measure which passed the House earlier this year. The Foundation submitted testimony in support of the measure at the Senate Judiciary Committee's October 18 hearing.

Meanwhile in Washington State voters are set to affirm property rights legislation passed by a strong bipartisan majority in the state legislature earlier this year. On November 7, Washington state voters will have the chance to approve referendum 48, which enables them to apply the review of direct democracy to the state legislature's action.

In both cases legislation would require the respective governments (federal or state) to compensate homeowners and other property owners when the value of their land is diminished by federal or state environmental regulations. In effect it would mean a procedure similar to eminent domain would be applied when homeowners property rights are eliminated or curtailed. Eminent domain is the term for the procedures used by the federal, state or local governments to acquire property for higher public uses (roads, school, etc.). Under eminent domain procedures property can be acquired from homeowners even over their objections. The procedures include a process to fairly compensate homeowners when such procurements are necessary.

Presently there is no compensation available if your property's value is seriously diminished by environmental regulations. "You might be planning on building a house on a lot you just bought, but a single new regulation could render it unbuildable", according to American Homeowners Foundation President Bruce N. Hahn. "You could be planning a deck or addition and find its no longer allowed", he added.

Several polls of homeowners have shown that more than 80 percent support compensation for homeowners whose land use must be restricted or eliminated. Most homeowners are also pro environment, but not to the point that they are willing to donate a majority of their net worth to the cause, worthy though environmental objectives may be.

The Foundation believes that property rights legislation will both restore the property rights of homeowners to the level intended by our nation's founders and also help protect the environment. "One of the reasons President Teddy Roosevelt was so highly respected was because he acquired so much beautiful and natural land for the government", observed the Foundation president. "Both of these measures will create a platform by which thousands of critically important habitats can be acquired for the public's benefit. It will force the environmental movement to adopt priorities just like the rest of us. When these measures pass we look forward to the return to a productive working relationship where homeowners and environmental groups can both pitch in and find ways to make room in federal and state budgets for really important purchases of environmentally sensitive property".

"For too long the left wing of the environmental movement has been ignoring the homeowners who have funded their organizations for decades. Perhaps that's why so many of us are cutting back on our contributions to these groups. The Foundation has not been successful in engaging any of them in a discussion of alternatives to the present situation", according to Hahn.

Founded in 1993, the American Homeowners Foundation is an independent non-profit consumer organization serving the nation's 65 million homeowners and millions of prospective homeowners. AHF is dedicated to helping them make the wisest and most well informed decisions relating to home ownership.

PREPARED STATEMENT OF THE AMERICAN SOCIETY OF FARM MANAGERS AND RURAL APPRAISERS AND THE APPRAISAL INSTITUTE

Thank you Mr. Chairman and Members of the Subcommittee. My name is John T. Widdoss and I am the 1995 President of the American Society of Farm Managers and Rural Appraisers (ASFMRA). I am a practicing real estate appraiser in Rapid

City, South Dakota and I hold the ARA designation of the American Society as well as the MAI designation of the Appraisal Institute. I am here today with Richard C. Sorenson, 1995 President of the Appraisal Institute. Mr. Sorenson is a senior real estate appraiser and analyst with First Chicago Bank in Chicago, Illinois. President Sorenson also holds the MAI designation of the Appraisal Institute.

Originally founded in 1929, the American Society's membership has been expanded throughout the United States, Canada, and other countries. The American Society's primary objective is to create and maintain a professionally trained group of accredited farm managers and rural appraisers capable of providing expert guidance and assistance to farmland owners, farmers, and other groups which have caretaking responsibilities for farm lands and rural properties. These caretakers include banks, insurance companies, attorneys and accountants.

The Appraisal Institute is an involved and respected participant in real estate appraisal and real property issues throughout the United States. The Appraisal Institute's mission is to lead the real estate appraisal profession by conferring meaningful designations which reflect demonstrated competency and integrity. As the recognized authority in real estate appraisals, the Appraisal Institute strives to serve the public and its membership with education, publications, and research while promoting and enforcing high standards of appraisal practice for all types of valuation and real estate analysis assignments. The Appraisal Institute is the world's largest publisher of real estate literature and offers an extensive educational appraisal curriculum.

Mr. Chairman, we appreciate the opportunity to present this testimony on the proposed language contained in S. 605, "Omnibus Property Rights Act of 1995." Our combined organizations represent nearly 36,000 professionals, many of whom are experts in agricultural land valuation and who may serve as an excellent resource for the subcommittee as the debate on this issue moves forward.

As you know, the Fifth Amendment to the United States Constitution guarantees that property will not be taken unless required for the greater public good, and then only with just compensation for the owner. Both the American Society and the Appraisal Institute are committed to the protection of an individual's right to own real property and to receive compensation in the event of a lawful taking by the government.

Regarding the proposed legislation, I will outline three primary concerns with S. 605 as currently drafted. Additionally, I will offer several examples highlighting some practical considerations which should be given attention. First, S. 605 makes no provision that a determination of value be made by a qualified appraisal expert. Second, for the protection of the individual property owner and the general public, the bill should reference the industry standards for the development of and reporting of an appraisal. These standards are known in the industry as the Uniform Standards of Professional Appraisal Practices (USPAP) promulgated by The Appraisal Foundation since 1957. The Appraisal Foundation, as recognized by Congress, is the source of appraisal standards and qualifications in federally related transactions. Finally, S. 605 utilizes the outdated and undefined term "fair market value" as opposed to the more accepted term "market value".

DETERMINATION OF VALUE

It appears that compensation to property owners and the determination of value are issues at the core of this legislation. Because it is a central issue, determination of value should require the services of an experienced and educated real estate appraiser. For example, S. 239, introduced by Senator Richard Shelby, contains language which requires such a determination to be made "by a qualified appraisal expert". Knowledge of current real estate practices with additional emphasis on valuation of property for various purposes is essential. Issues of legal use, right-of-way, easement, and public utility are likely to play a part in the valuation of real estate property contemplated in S. 605. We believe that the issue of market value is a relevant benchmark for unique properties such as unspoiled wilderness, fish and wild game habitats and sites of archaeological or historic significance. Restrictions on land use due to the Endangered Species Act, wetlands and other environmental issues, and aesthetic set-aside concerns pose complex valuation scenarios. Designated real estate appraisers, such as members of American Society and the Appraisal Institute, are often uniquely qualified to consider these issues.

The Endangered Species Act is an area of significant concern for much of the farming community. From a farm manager's perspective, operation of that Act can destroy the economic viability of a farming operation, and from an appraiser's perspective, the uncertainty in the marketplace because of the imposition of this Act makes it more difficult to accurately value affected property. Determining the value

impact of a taking, either in whole or in part, under the Endangered Species Act is an issue that should be addressed. The American Society and the Appraisal Institute believe that the economic impact of a taking can be determined by a competent appraiser who is knowledgeable of market conditions in the area and who understands both the theory and application of the concept of highest and best use.

Often a loss may be perceived in terms of potential uses of the property, including future uses not presently legally permissible. Because this goes to the issue of value and cost, allow us to give you a couple of examples. In the case of powerline easement acquisitions, a property right is acquired through the power of eminent domain. In many cases, as evidenced by market data, no loss in value will occur as a result of locating a powerline along a property line or roadway. In fact, in remote rural areas, properties with powerlines from which electric service for the property can be obtained will bring a premium as compared to one without a powerline. Often, analysis of rural subdivisions has shown that tracts with powerline easements may be the last tracts to sell in a subdivision, but they will sell for the same price as tracts without powerlines. While some economic loss is measurable through a "time value of money analysis," typically such a loss is insignificant.

Conversely, large metal tower electric transmission lines or such lines crossing a property diagonally, can result in significant value losses to the owner as a result of a change in highest and best use. Also, health concerns regarding the effects of continual exposure to electromagnetic fields associated with these lines has resulted in a lower value for properties with these lines as compared to those without.

In the case of regulatory takings pursued under police power, loss in value and economic use of a property may be subtle and only occur over time. For example, in the well documented case of the endangered Golden Cheeked Warbler, the declaration of an area as "critical habitat" required that the landowner halt all removal of cedar trees (actually ashe juniper trees) from a property. Some of the area contains property which will naturally not become overgrown with cedar, but most of the area is susceptible to rapid, heavy infestation. If cedar is not removed, as a part of an ongoing management plan, in 20 years it will become a cedar forest and no other plant growth will occur. When this happens, the economic benefit in owning the property for other uses is minimized and it becomes solely a habitat for the Golden Cheeked Warbler. If there is no market demand for Golden Cheeked Warbler habitat a catastrophic loss in value may result even though the initial effects were minimal.

More often than not, any form of acquisition of a property right requires a technically competent professional to assess the value impact of the acquisition. Some acquisitions result in little or no loss in value, but the rest result in the loss of some or all economic use and value of the property.

In either case (the powerline or the warbler), technical expertise and a firm grasp of the appraisal process is required in the valuation analysis. We recommend that the legislation allow the determination of value to be based upon appraisals completed by competent appraisers with knowledge specific to the area and the property type.

USPAP

Regarding the second issue, the appraisal profession has adopted a set of uniform standards for the development of and reporting of an appraisal. Promulgated by the independent Appraisal Standards Board of the Appraisal Foundation, these standards help guide practitioners through a methodology which results in a supportable and defensible estimate of value. The Appraisal Foundation is authorized by Congress as the source of appraisal standards and qualifications in federally related transactions. Further, USPAP recognizes that the valuation of real estate considers the appraisal of property rights and, specifically, the impact on value of government regulations on the use, utility, and value of any property. Language requiring utilization of USPAP should be included in the bill.

MARKET VALUE

Third, S. 605 includes language requiring payments to property owners representing the "fair market value" of property. The generally accepted terminology in the industry today however is "market value". Market value is widely understood and has been soundly developed and supported by appraisal literature, statutes, and court precedents. Market value is based on the concept of an open and competitive market in which typical transactions are free of the aspects of duress or forced liquidation. As a practical matter, a change in the current language to reflect the more generally accepted term market value will help clarify the process.

We note that the bill contains no definition of market value. *The Dictionary of Real Estate Appraisal*, second edition, incorporates the concepts that are most widely accepted, such as willing, able, and knowledgeable buyers and sellers who act prudently, and gives the appraiser a choice among three bases: all cash, terms equivalent to cash, or other precisely revealed terms. Accordingly, market value has been defined as:

The most probable price, as of a specified date, in cash, or in terms equivalent to cash, or in other precisely revealed terms, for which the specified property rights should sell after reasonable exposure in a competitive market under all conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably, and for self interest, and assuming that neither is under undue duress.

Both the American Society and the Appraisal Institute support and encourage real estate appraisal legislation and regulation designed to benefit the general public. We support the principle that individuals involved in real estate transactions deserve the fundamental protection provided by a skilled professional appraiser who is accountable, impartial, and required to observe industry standards.

We appreciate your willingness to hear our suggestions. We stand ready to provide additional information you may require as your process continues. We look forward to working with you on this and other matters of mutual concern.

Thank you.

PREPARED STATEMENT OF THE HERITAGE FOUNDATION

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE: Thank you for inviting me to submit written testimony of my views on S. 605 and the issue of *de facto* taking of property through federal regulation, known popularly as "regulatory takings." I submit this testimony in my own capacity and not as an employee or spokesperson for The Heritage Foundation.

Your efforts and consideration of the need to relieve property owners from increasingly intrusive and confiscatory federal governmental actions is welcome. Legislation is desperately needed to rectify the situation. While opponents of this legislation raise numerous concerns, an examination of their objections shows them to be without merit. In addition to stating why I believe this legislation is necessary, from both a modern and historical perspective, I will explain the flaws in the four main arguments of opponents of this bill. Specifically, their flawed arguments are that:

- (1) the Constitution requires "courts to balance important public needs against the legitimate rights of property owners;"
- (2) the federal government cannot afford to pay property owners compensation for the rights taken from them;
- (3) the law would constitute an entitlement and would be subject to the pay-as-you-go (PAYGO) budget rules; and
- (4) compensation to property owners amounts to "paying people not to pollute."

The federal government owns or controls about one out of every three acres in the nation, yet federal agencies in recent years have increased their use of regulation as a tool to obtain further control over private land because it imposes no cost on the government. But these regulations are not without substantial cost to others.

The most unfair and burdensome hardship inflicted by regulatory takings typically is that property owners are not reimbursed for their loss. For instance, if an elderly couple spends a large portion of their retirement savings to buy property to build their dream home and that property is subsequently designated a wetland, the value of their property—and their savings—is virtually gone. Unfortunately, tales of financial hardship caused by government designation of land as wetlands or endangered species habitat have become commonplace. To understand the enormity and the depth of the problem, I recommend you read The Heritage Foundation's recently released book, *Red Tape in America: Stories From the Front Line*. The instances of regulatory excess are so voluminous, the Foundation published a special abridged edition, *Strangled by Red Tape*.

Former Office of Management and Budget Director Leon Panetta, speaking on May 26, 1994 before the House Subcommittee on Water Resources and Environment, said paying compensation for regulating wetlands would be "an unnecessary and unwise use of taxpayer dollars" and a drain on the federal budget. Property owners, however, counter that regulatory takings are a drain on their family budget. If these regulations are so cost-ineffective so that it would not be in the governmental interest to regulate even if it were required to pay, then surely the same

action cannot be considered in the public interest when one citizen is saddled with the entire burden of providing for the "public good."

The Administration's objection to paying compensation for infringing of property rights, at its roots, seems based on a fundamental misconception of the relationship of the individual to the state. This misconception manifests itself in the widely held, but mistaken, belief that the Bill of Rights' fifth Amendment requires a balancing of interests. As current Office of Management and Budget Director Alice Rivlin stated in a June 7th letter to Senator Hatch, the Constitution,

has served us well for over 200 years by permitting courts to balance important public needs against the legitimate rights of property owners. S. 605, however, would go far beyond a reasonable balancing of interests, as required by the Constitution. It purports to entitle property owners to compensation * * * without regard for the public interests being served by agency actions.

This statement demonstrates a profound misunderstanding of the Constitution. The Constitution's just compensation protection does not require courts to balance the respective interests of the government and property owners. Rather, the right to compensation for any action that qualifies as a taking is *absolute*. Perhaps there is some measure of balancing built into the common measures of what constitutes a taking of a right to property, but the "legitimate rights of property owners" are not and should not be balanced by important needs. Rather, compensation for a taking is the balance built into the Constitution. Implicitly, the government is given the right to seize property, but is constrained in this otherwise almost unconstrained power by the necessity to pay for what it takes. Compensation not only protects property owners from financial ruin, it protects them from excessive governmental appetite. It is unlikely that many governmental entities would not assert control of other's property if that use were free of cost. Relying on the beneficent character of each regulator is an unstable foundation for securing the protection of the people.

To understand why legislative protection for landowners is both important and appropriate, it is necessary to understand the broader issue of governmental taking of property. The fifth Amendment to the U.S. Constitution implicitly recognizes that the federal government may take private property for public use. This power was recognized by the Supreme Court as early as 1795 in *Vanhorne's Lessee v. Dorrance* when the court found that "the despotic power, as it has been aptly called by some writers, of taking private property, when state necessity requires it, exists in every government * * * government could not subsist without it."

The Fifth Amendment explicitly mandates, however, that government must pay the property owner for the property confiscated. This concept, embodied in the clause "nor shall private property be taken for public use, without just compensation," ensures that property taken for public use is paid by those who benefit—the public—and not by the citizen unfortunate enough to own land the government wants. In its most basic sense, this is a fairness issue: Why should one American bear the entire burden of the government's pursuit of a national good?

The Founders well understood the positive economic consequences of protecting owners' investments in their property. If property is to be put to its best and most highly valued use, ownership must reside in the hands of those who value it for as much or more than the fair market value. If government had a free hand to take property without payment, its incentive to confiscate property that conferred only a small benefit on the public would be large; after all, even small benefits outweigh a zero cost. The problem is that costs are nonexistent only to the government. The actual costs, borne by someone else, often are substantial.

Another positive result of requiring just compensation is increased security. The founders well understood that protection of property restrained usurpation of other rights recognized by the Constitution. It is this relationship to which Supreme Court Justice Potter Stewart referred in *Lynch v. Household Finance Co. Inc.* in 1972 when he stated that there is a "fundamental interdependence * * * between the personal right to liberty and the personal right to property.

Practically speaking, governments can control a wide spectrum of individuals' activities if they can control whether individuals remain financially secure or must surrender their property. The majority truly can tyrannize a disfavored minority if property rights are uncertain. As James Madison characterized the problem of individual rights in Federalist Paper No. 10, "it is that [pure] democracies [without constraints] have ever been spectacles of turbulence and contention; have ever been incompatible with personal security or the rights of property." It was to restrict just such tyranny over individuals that the Framers put severe limits, such as the requirement of just compensation, on the unchecked will of the majority.

Although the framers were clear that a taking requires just compensation, the Supreme Court has been unclear in its interpretation of what constitutes a taking. That is why this legislation is necessary. Although it couldn't alter the Supreme Law of the land, legislation that defines a taking—and a less cumbersome recovery process—would serve to protect the people against the problems and abuses of property envisioned by our founders.

The primary argument espoused against property rights legislation is that the government cannot afford it, but individual property owners can. This argument is specious. First, the argument is, again, based on the belief that a balancing of interests is appropriate. This belief is incompatible with the concept of property protection. The issue of legislative compensation should revolve around whether a property right has been infringed, not whether it serves an important public purpose. After all, one would assume the government always had an important public purpose whenever it deliberately infringed its citizens' rights to use their own property.

A second problem with the argument is that it is simply unfair. In every specific instance, the question comes down to whether the government will finance the pursuit of a "national good," or whether it will be borne by a single property owner. How can the federal government, with its vast resources and access to additional revenues, not afford a single parcel that serves an important public purpose, yet some hapless property owner have resources to spare? Even if an owner did, why should he or she finance the "national good." If the public as a whole benefits, the public as a whole should bear the costs—period.

The third flaw in the opponents' argument that the federal government cannot afford to compensate for what it takes is that the argument assumes agency behavior would not change. Yet one of the primary purposes of the legislation, as Title I states, is "to restrain the Federal Government in its overzealous regulation of the private sector" and "the minimization, to the greatest extent possible, of the taking of private property by the Federal Government." This purpose, moreover, very likely would be achieved.

We know from environmental legislation, as well as many other areas of the law, that if we tax a behavior, we get less of it. If we subsidize the behavior, we get more of it. Currently, for instance, we force property owners to subsidize the federal government's preservation of wetlands and endangered species habitat, and regulatory intrusions have increased. By the same token, however, if we "taxed" government agencies' behavior by making them internalize the consequences of that behavior, we could confidently expect to see less of it. But that doesn't mean we would necessarily get less protection. It means merely that agencies would be required to prioritize what regulations would get the "biggest bang for the buck."

Crafted to encourage a change in agency behavior, the Administration nevertheless protests that regulation will continue at its current speed. Thus, this legislation will cost, according to Director Rivlin's June 7th letter to Senator Hatch, \$84 billion or more over the next seven years, or \$12 billion or more per year.

From a budgetary perspective, this claimed inability to change behavior rests largely on the assertion by the Administration that S. 605 would fall under the pay-as-you-go or PAYGO provisions of the Budget Enforcement Act, and thus possibly would cause a sequester of other mandatory programs." The Administration wrongly assumes that this particular bill falls under the pay as you go rule, which means it is a mandatory program and not an discretionary one. While increases in mandatory spending require either reductions in other mandatory programs or increases in taxes to offset these new permanent costs, the rule does not apply here. To fall under the PAYGO provisions, the rights to compensation must be considered an entitlement, and thus, awards would not be subject to discretionary appropriations. Yet S. 605 specifically states in section 204(f) that awards:

shall be promptly paid by the agency out of currently available appropriations supporting the activities giving rise to the claims for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

Another argument that opponents of property rights legislation assert is that a law requiring compensation would in effect force government agencies to pay polluters not to pollute. This argument is based on a fundamental misunderstanding of the nature of property rights legislation in general and S. 605 in particular. Requiring compensation for "regulatory" takings of property no more constitutes paying polluters not to pollute than requiring compensation for "physical" takings does. In both cases, the government infringes property owners' rights to use their property in a way that enriches their own lives in order to satisfy the public's desire to use

the property differently—yet I have never heard anyone claim that the Constitution as interpreted regarding “physical occupations” is anti-environmental or a windfall to polluters. The reason is straightforward. The government would only be required to compensate property owners when it interferes with their ability to use or develop their own property, not when it prohibits nuisance behavior such as dumping raw sewage into a stream. Indeed, such behavior is protected for neither partial takings under this legislation nor total takings under *Lucas v. South Carolina*, in which Justice Scalia explicitly noted that owners had no right to engage in nuisance behavior. Thus, the vivid and frightening images that government would be required to pay property owners not dump toxins into our air and water are divorced from reality. Rather, these scare stories are high blown rhetoric used to raise funds, scare the public, and confuse legislators.

Opponents implicitly argue that the mere act of development is pollution. Certainly actions such as building a house affect the environment, but most people would hesitate to label that behavior “pollution.” After all, if all actions that changed nature were pollution, it would indict virtually all human activity and the charge would be meaningless. Rather, pollution is defined in Webster’s Collegiate Dictionary as “environmental contamination with man-made waste.” Under this definition, there is little substance to the charge that “polluters would be paid not to pollute.” If, for instance, hazardous wastes were emitted into the air, dumped into the water, or migrated through the soil to groundwater, the waste could legitimately be deemed a “nuisance” and compensation would not be due.

In conclusion, the Administration seems to be grasping at straws to criticize this bill. It is obvious why America has demanded this legislation. The federal government’s reach has stretched too far into the lives of honest, hard-working middle class property owners and they demand that it stop. This bill would be a solid step toward that goal.

PREPARED STATEMENT OF THE NATIONAL ASSOCIATION OF REALTORS®

On behalf of the National Association of Realtors® (NAR), we appreciate the opportunity to offer our comments on S. 605, the “Omnibus Property Rights Act of 1995,” which seeks to address the issue of takings of private property through federal regulatory actions.

On the local, state and national level, NAR has worked for years to encourage a balanced approach to environmental protection that accommodates the important needs for both conservation as well as economic opportunity and vitality. To balance the efforts of government to serve the public’s well-being by controlling pollution and protecting natural resources with the economic and property rights secured by the Constitution, we believe that the cost of the benefits to the general public achieved by such regulation should be borne by the beneficiaries—the general public. We oppose those aspects of environmental and natural resource legislation that amount to uncompensated condemnation of private property through government action. It is essential that the rights of private property owners be fully recognized in local, state, and federal programs and laws.

In recent years, as efforts to protect the environment have escalated, legislative and regulatory restrictions on the use of private property have become more stringent. While we do not disagree with the importance of protecting our natural environment, we feel that any such restrictions on the use of property should be balanced with the constitutional rights guaranteed to us under the 15th Amendment. Unfortunately, this balance has often tilted in favor of environmental protection, at the expense of property rights.

S. 605 will restore that balance. It allows property owners who, as a result of federal agency action, are deprived of thirty three percent or more of the value of property to seek compensation for such takings. Despite what the bill’s opponents claim, S. 605 does not result in people who pollute being compensated by the government. S. 605 specifically bans compensation for any private action that would result in a nuisance or would be in violation of state laws.

S. 605 also requires federal regulatory agencies to perform a takings impact analysis prior to promulgating any regulation and to consider alternatives to taking federal property. We feel that this is a vital part of the legislation since it forces federal agencies to adopt a “look before you leap” approach to regulations which may impact property owners.

Over the past few years, the federal courts have increasingly recognized the validity of claimants who have argued that their property rights have been infringed by government regulation. In the recent *Dolan v. City of Tigard* case, the U.S. Supreme Court made it clear that it considers private property rights to be of equal impor-

tance with environmental regulation. Writing for the Court, Chief Justice Rehnquist stated, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First or Fourth Amendment, should be relegated to the status of a poor relation."

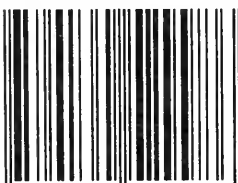
Opponent of this legislation point say that the protections for property owners already exist in the Constitution and that this legislation is duplicative and unnecessary. However, we do not feel that small property owners should be subjected to years of costly litigation to protect what are their basic constitutional rights. By providing alternative disputes resolution and expedited administrative appeal for property rights cases. S. 605 will level the playing field for property owners and place the burden for justifying takings back where it belongs, on the federal government.

The National Association of Realtors® strongly support S. 605 and urges the Judiciary Committee to take action this year on this vital legislation.

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